# Sheriff Law:
## Or A Practical Treatise On The Office Of Sheriff, Undersheriff, Bailiffs, Etc.

(1854)

George Atkinson

# SHERIFF-LAW;

OR,

A PRACTICAL TREATISE ON

# THE OFFICE OF SHERIFF,

## UNDERSHERIFF, BAILIFFS, ETC.:

THEIR DUTIES

AT THE

Election of Members of Parliament and Coroners,

ASSIZES, AND SESSIONS OF THE PEACE.

WRITS OF TRIAL; WRITS OF INQUIRY; COMPENSATION NOTICES;
INTERPLEADER; WRITS; WARRANTS; RETURNS;
BILLS OF SALE; BONDS OF INDEMNITY, ETC.

BY

GEORGE ATKINSON, SERJEANT-AT-LAW,

AUTHOR OF "THE SHIPPING LAWS OF THE BRITISH EMPIRE," "INTERNATIONAL LAW," ETC.

THIRD EDITION.

London:
LONGMAN, BROWN, GREEN, AND LONGMANS.
1854.

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TO

SIR GEORGE MUSGRAVE, BART.,

OF

HARTLEY CASTLE AND EDENHALL,

LATE

HIGH SHERIFF OF CUMBERLAND,

THIS WORK

IS DEDICATED BY

HIS OBLIGED FRIEND.

I ought not to allow this edition to go forth without publicly expressing my thanks to SIMEON JACOBS, ESQ., of the HOME CIRCUIT, for the great service he rendered to me while it was in the press.

G. A.

# ANALYSIS.

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# THE PRACTICE

OF

# THE OFFICE OF SHERIFF.

## CHAPTER I.

### Section I.

### GENERAL OBSERVATIONS.

The Sheriff is an officer of great antiquity in this Kingdom. He was an officer and minister of Justice long before the Conquest;[a] as some say, *à principio legis*.[b] His name is composed of the two Anglo-Saxon words—*scyr* (shire) and *gerefa* (reeve or keeper). During the Anglo-Norman period of our history he also acquired the name of *Viscount*;[c] and, with a new name, he acquired new duties; he had the wardship of the County committed to him, when the *Counts*, whose charge it was, were obliged to go away to attend on the person of their Sovereign. The *Gerefa* and the *Count* may be supposed to have been in the relation of our present Sheriff and Lord Lieutenant; or, perhaps, the Sciregerefa was the *fiscal* officer, and the Count the general guardian of the County, when a part of his duties, for the reasons alleged, were transferred to the Sciregerefa. The word Viscount would seem to imply delegation. The earliest records, however, not only give no trace of any dependence of the Viscount upon the Count, but show, most clearly, that the former was then as absolutely independent of the latter as the Sheriff is, at this day, independent of every other subject. The Latin words, so often quoted, *vicecomes dicitur, quòd vicem Comitis suppleat,* properly admit of this construction; for the word *vicis* as often means a change by way of succession as by substitution.[d] Lord Coke says that Count,

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[a] 3 Rep. Pref. 11, 12; 9 Ib. Pref. 6; Co. Litt. 168 a; Dalton's Sheriff, 1; 1 Bl. Comm. 339 a; Bac. Abr. (*Sheriff*); Fortescue, *de Laud. Leg. Angliæ* (Edit. Amos).

[b] Doderidge, J., 1 Roll Rep. 364.

[c] Mirror of Justices, c. 1, s. 3; Seld. Tit. Hon. p. 2, c. 3, s. 20; Ancient Laws and Institutes of England, Gloss. See Lye's Dict., Sax. et Gothico-Lat. (Edit. Manning, 1777); Wilkins Lex. Angl.-Sax. 199; Lambard's Archaionomia; Bosworth's Anglo-Saxon Dict. (Tit. *Scyr Gerefd.*)

[d] See Facciolati Lex. (Tit. *Vicis.*)

Viscount, and Comitatus, were called by the Romans, Consul, Pro-Consul, and Consulatum. By this he means that the offices were the same under different names. This has, however, been doubted by men of great authority.[a] The Roman and the Anglo-Saxon did not differ, in race, more than the Pro-Consul and Viscount did, in office. They had little or nothing in common; and were it not for the suggestions of so great a lawyer, this idea would be well nigh without authority.

He has, according to Lord Coke, a threefold custody, viz.: 1, *vitæ justitiæ*, for no suit begins, and no process is served, but by the Sheriff; also he is to return indifferent juries, for the trial of men's lives, liberties, lands, and goods: 2, *vitæ legis*, he is after suit chargeable to make execution, which is the life and fruit of the law: 3, *vitæ reipublicæ*, he is principal *conservator pacis*, within the County, which is the life of the Commonwealth, *vita reipublicæ pax.*[b] In these different characters he will appear, in the course of the present work. A few preliminary propositions, however, will simplify the task.

Shire.

A *Shire* or *County* is one of those several divisions, into which the realm is divided, for the better government of it, and the more easy administration of justice.[c] The author of the *Mirror of Justices*,[d] Speed,[e] and others, attribute this division of the realm to Ælfred; but we find *Scyr*, *Scyre-Gerefa*, *Scyrman*, *Scyre-gemote*, &c., long before his time. This, necessarily, supposes the existence of a *scyre* before. "I have heard (says Fuller) some critics making this distinction betwixt that such are *shires* which take their denomination from some principal town, as Cambridgeshire, Oxfordshire, &c., whilst the rest, not wearing the name of any town, are to be reputed *counties*, as Norfolk, Suffolk, &c.; but, we need not go into Wales, to confute their curiosity, where we meet Merionethshire and Glamorganshire, but no towns so termed; nay, Devonshire doth discompose this their English conceit."[f] Of this division of the realm into counties or shires, our Courts take *official notice;* but the local situation of any place in any county, the Courts do not *officially* notice.[g]

Quillets.

There is no part of the kingdom that lies not in some county.[h] There are certain districts or places, parcel of one county, within the boundaries of another; these districts or places are called *Quillets;* and were, within memory, productive of inconvenience in the execution of process of the Superior Courts by reason of their locality;[i] but this has been remedied by the legislature;[k] and they now, *for all purposes*, form part of that county of which they are considered parts, for the purposes of the election of members to serve in Parliament, as knights of the shire, under the 2 & 3 Will. 4, c. 64.

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[a] Hargrave's Note, Co. Litt. 168 a.

[b] Co. Litt. 168; Dalt. c. 5.

[c] Fort. de Laud. Leg. Angl., c. 24 (edit. Amos); Co. Litt. 125 a; 1 Bl. Comm. 116.

[d] Andrew Home, A.D. 1080.

[e] P. 1, n. a.

[f] C. xviii.

[g] *Deybel's case*, 4 B. & A. 243; 1 Salk. Rep. 266; see *Brune* v. *Thompson*, 2 Q. B. 790.

[h] Fort. c. xxiv.; Jenk. Rep. Ca. 7.

[i] See Hearne's Coll. 50; 2 & 3 Will. 4, c. 64, Sch. M.

[k] See 2 Will. 4, c. 30, s. 20; 2 & 3 Vict. c. 82; 7 & 8 Vict. c. 61; 7 & 8 Vict. c. 92.

A Sheriff, in former times, had, often, more counties than one under his charge. The Sheriff of Cambridge, who is now Sheriff of Huntingdon also, affords an existing example; London and Middlesex affords another.[a]

Counties Palatine.

In England and Wales, there are 52 Counties. The former is divided into 40; and the latter into 12. *In England*—Bedford, Berks, Bucks, Cambridge, Chester, Cornwall, Cumberland, Derby, Devon, Dorset, Durham, Essex, Gloucester, Hereford, Hertford, Huntingdon, Kent, Lancaster, Leicester, Lincoln, Middlesex, Monmouth, Norfolk, Northampton, Northumberland, Nottingham, Oxford, Rutland, Salop (or Shropshire), Somerset, Stafford, Suffolk, Surrey, Sussex, Southampton (or Hampshire), Warwick, Westmoreland, Worcester, Wilts, York. *In Wales*—Anglesea, Caernarvon, Denbigh, Flint, Merioneth, Montgomery, Brecknock, Cardigan, Caermarthen, Glamorgan, Pembroke, Radnor. The Counties of Durham, Lancaster, Chester, and Middlesex require a separate note. The first three are *Counties Palatine*, the last is said to be in perpetual *fee farm*, to the mayor and commonalty and citizens of London. Durham was a county palatine by prescription held by the Bishop of Durham. It is now, by the 6 & 7 Will. 4, c. 19, held by H. M., as a franchise and royalty separate from the Crown.[b] Lancashire, on the attainder of Hen. 6 (1 Edw. 4), became forfeited; and was then, by act of parliament, vested in K. Edw. 4th and his heirs—*K. of England*—for ever; but under a separate guiding and governance from the other inheritances of the crown.[c] By the 11 Geo. 4, and 1 Will. 4, the power, authority, and jurisdiction of the Court of Session, of the County Palatine of *Chester*, and of the judges thereof, and of the Court of Exchequer there, and of the chamberlain and vice-chamberlain thereof, and also of the judges and Courts of Great Sessions, both in law and equity, in the Principality of Wales, ceased and determined; and the jurisdiction of the Courts at Westminster was, instead, extended to them. Notwithstanding, Cheshire is still a county palatine. From the year 1202 to 1850 *Westmoreland* was held, like Middlesex, in perpetual *fee farm* by a subject. But on the death of the late Henry, Earl of Thanet, the appointment to the office of High Sheriff was vested in Her Majesty.[d]

*Middlesex* was, by a charter of Hen. 1 (confirmed by K. John), vested *in fee* in the mayor and commonalty and citizens of the city of London, upon condition of their paying 300*l.* a year to the King's exchequer. By an act of Common Council, dated 7th of April, 1748, it is ordered (amongst other things) "That henceforth the *right of electing* persons, to the said offices of Sheriffalty, shall be, and the same is hereby *vested in the liverymen of the several companies* of this city," &c. The Sheriff of a County Palatine, and of Middlesex, is, to a Court of Justice, what the Sheriff of an another County is; they differ only in the mode of their appointment, manner of accounting, and the like.

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[a] See 1 Camd. Brit. 344 (edit. Gibson); *Wilkes' case*, 4 Burr. 2560; Fort. c. xxiv.; Mad. Exch. p. 635; Gilb. C.B. 15.

[b] See Bracton, lib. iii. c. 8, s. 4; 4 Inst. 204; 5 Cromp. Juris. 137; 1 Danv. Abr. 750; Dalt. p. 2, *Del Countie Palatine*; Sir J. Davis, 62.

[c] Co. Litt. 170; 4 Inst. 204; Plowd. 215; T. Raym. 138; 1 Ventr. Rep. 155, 157; 4 Inst. 245: as to the appointment of High Sheriff, see c. 1, s. 3.

[d] 13 & 14 Vict. c. 30.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 122), "all writs of every description issuing out of the Superior Courts of Common Law at *Westminster* to be executed in the Counties Palatine shall be directed and delivered to the Sheriffs of such Counties and executed and returned by them to the Courts out of which such writs are issued in the same manner in all respects as writs are executed and returned by the Sheriffs of other Counties."

The Sovereign, it is said, may, at pleasure, make any County a County Palatine.[a]

In the City of *Oxford,* in the Town of *Berwick upon Tweed,* and in the Counties of the Cities of *Bristol, Canterbury, Chester, Exeter, Gloucester, Lichfield, Lincoln, Norwich, Worcester* and *York,* and in the Counties of the Towns of *Caermarthen, Haverfordwest, Kingston-upon-Hull, Newcastle-upon-Tyne, Nottingham, Poole* and *Southampton,* the Council appoint, on the 9th of Nov. every year, a fit person to execute the office of Sheriff.[b]

Some of these Counties Corporate had, before the Municipal Corporation Act, as *London* still has, *two* Sheriffs constituting in law but *one* officer.[c]

There are certain Ports, wherein the Constable of Dover Castle, as Lord Warden, executes all writs, &c.; their names are Dover, Sandwich, Romney, Hastings, Hythe, Winchelsea and Rye;[d] they are called *Cinque ports.*

*A Franchise or Liberty,* as the term is here used, is a royal privilege, or branch of the Royal prerogative, vested in a subject, who in person, or by proxy, executes the civil process of the law therein. All liberties are officially noticed by the Courts.[e] The High Sheriff is, likewise, bound to notice them.[f] *A Bailiwick* is, now, in general, used to signify Sheriffwick, or the whole county, as in the return of a writ, where the person is not arrested, the Sheriff says, "the within-named A. B. is not found

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[a] Vaugh. Rep. 418; 4 Inst. 201.

[b] 5 & 6 Will. 4, c. 76, s. 61; see *Grainger* v. *Taunton,* 5 Dowl. 190.

[c] See Bac. Abr. Sheriff, K.; Vin. Abr. Sheriff, C. a, pl. 1. Although, as a general rule, the *two* constitute in law but *one* officer, yet, for some purposes, they are separate officers. *Thompson* v. *Farden,* 1 Sc. N. R. 282; *Letsom* v. *Bickley,* 5 M. & S. 144.

[d] Jurisdiction, see 1 & 2 Geo. 4, c. 76, s. 18; Jeak's Cinque Ports, Itin.

[e] *Boothman* v. *Surrey,* 2 T. R. 5; *Carrett* v. *Smallpage,* 9 East, 338; *Newland* v. *Cliffe,* 3 B. & Ad. 633.

[f] *Ibid.*

*in my Bailiwick.*" In the Magna Charta, c. 28, and in the 14 Edw. 3, c. 9, the word "Bailiff" seems to comprise, as well Sheriff as Bailiff of a hundred.[a]

Officer of *all* Courts.

The Sheriff is the immediate officer to *all* the Courts at Westminster to execute writs; and the law presumes him to be indifferent between party and party.[b] The law, likewise, intends him to be a lay person, and to have no skill in the science of the law; and, whether a writ comes to him, by authority, or without authority, or is awarded against whom it does not lie, he cannot doubt, or dispute its validity.[c] His power does not extend beyond his county, but by special authority from the Crown, as by *Habeas Corpus* and the like. By such authority, he is, in other counties, sheriff to a special intent; and the law regards the removed, the prisoner of the same sheriff in every county. By this means, it is said, there may be *two* Sheriffs in *one* county; namely, *one to a special intent*, and *the other to all general intents and purposes.*[d] His *ministerial* acts may, in general, be executed dehors his county;[e] for example, he may make his return *any where in England:* so the assignment of a bail-bond, or a panel, may be made anywhere in England. Again, a writ delivered to the Sheriff when out of his county, will, in general, have the same effect as if it were delivered to him when within it. So, if a prisoner of his own wrong, make his escape, and get into another county, the Sheriff, or his officers, upon fresh pursuit, may retake him there.

The office cannot be abridged.

The office cannot be apportioned, divided or abridged;[f] and, therefore, although the Queen may determine it at pleasure, (the Sheriff being appointed *durante bene placito*,[g]) she cannot determine it in part, as for one town, or for one hundred, except by making such town, &c., a county of itself, and appointing a Sheriff thereto. Neither can the Crown take from him anything incident to his office.[h] On the demise of the Crown he holds his office for six months, unless sooner displaced by another.[i] It does not determine by becoming a Peer, though the dignity descend in time of parliament.[k]

Office, how forfeited.

Misuser is a cause of forfeiture of office, if held for life or in fee; or, a ground of removal, and a fresh appointment, if appointed *durante bene placito.*[l]

The office has been executed by a *female;* Anne, Countess of

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[a] Co. Litt. 168, b; 2 Inst. 18.

[b] Dalt. 311; Plowd. 73, a; but he is, also, to a certain intent the *agent of the party* who puts him in motion, see *Barker* v. *St. Quintin*, 12 M. & W. 452.

[c] See *Magnay* v. *Burt*, 5 Q. B. 394.

[d] Plowd. 37 a.

[e] 1 Wils. 336; 5 Co. 89 a; Dalt. 22; 1 Salk. 273.

[f] 4 Co. 33; Wood's Inst. 71; Hob. 13.

[g] See "Wt. of Appt.;" 3 & 4 Will. 4, c. 99; 6 & 7 Will. 4, c. 105, s. 4.

[h] Dalt. p. 6.

[i] 1 Ann. st. 1, c. 8; Dy. 165 a.

[k] Cro. Eliz. 12, pl. 3.

[l] Dy. 151, b; Dalt. p. 6.

Pembroke, held the office in *Westmoreland;* and, at the assizes at Appleby, sat, in person, with the judges on the bench.[a]

The Courts take *judicial* notice of him.[b]

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## SECTION II.

### QUALIFICATION.

Qualification.

THE *Statute of Sheriffs* (9 Edw. 2, c. 16, st. 2, A.D. 1315,) declares, "that none shall be Sheriff, except he have *sufficient land within the same shire where he shall be Sheriff,* to answer the king and the people;"[c] but the extent of this qualification is undefined. As there are many onerous duties cast upon him, for which the law has not provided distinctly any remuneration, men of standing and substance are, for the most part, appointed to the office, that they may be able to bear those duties with more ease and dignity.[d] At common law, *no salary* is incident to the office; and this is another reason for appointing men of substance to it. Salaries were formerly granted by Parliament, and this grant still remains as to some counties; as in *Wales,* where every Sheriff has, for his fee, 5*l.* a year;[e] and the Sheriff of Cambridgeshire has some rent payable out of lands within the manor of Maddingly, in the same county.[f] So, in counties corporate and towns, by virtue of some bye-law, an allowance is made. The *Auxilium Vicecomiti* was a fee of this kind.

Salary.

In 1767, by one of the ablest judgments on record, it was adjudged that a Dissenter was *not* compellable to qualify himself, by taking the Sacrament, according to the rites of the Church of England; and that a Dissenter's election to the office was null and void.[g] As the *disabling statutes,* upon which the question arose, are repealed, as to the sacramental test; and, as regards Roman Catholic subjects, an oath, in harmony with their religious creed, has been substituted, instead of the oaths of allegiance, supremacy, and abjuration, the law may be briefly stated thus:[h]—*no man is exempt from the office of Sheriff, but by Act of Parliament*,[i] *letters patent; by disability, arising from a judgment in law;*[k] *or, by reason of the office being incompatible with another.*[l]

Dissenters.

Militia officer.

1. Before the 2 & 3 Vict c. 59, *no militia officer,* during the time he

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[a] Co. Litt. 326 a.

[b] 1 Salk. 266.

[c] And see 4 Edw. 3, c. 9; 5 Edw. 3, c. 4; 28 Edw. 1, c. 13.

[d] *Graham* v. *Grill,* 2 M. & S. 297.

[e] 34 & 35 Hen. 8, c. 26, s. 64.

[f] 34 & 35 Hen. 8, c. 24.

[g] *Harrison* v. *Evans,* Cowp. 393; 2 Burn's E. L. 220 (8th edit.).

[h] 13 Car. 2, st. 2, c. 1; 25 Car. 2, c. 2; 16 Geo. 2, c. 30, repealed as to so much as imposed the necessity of taking the sacrament, by 9 Geo. 4, c. 17, and 5 & 6 Will. 4, c. 28. The acts relating to declarations against transubstantiation are repealed by 10 Geo. 4, c. 7.

[i] *Larwood's case,* 1 Ld. Raym. 32. There are many, as the *Jews,* who cannot, conscientiously, take the oaths and make the declaration required by law; but this is not a cause of disability nor exemption.

[k] 2 Mod. 305; 4 Ib. 273.

[l] See *Norwich* v. *Berry,* 4 Burr. 2114.

was *acting* in that capacity, was obliged to serve the office; but such person is not now exempt, on that account, unless he was employed, *i.e.*, in actual service in the militia, before the end of the war in 1815. The 16 & 17 Vict. c. 9, 10, and, in general, the mutiny acts, disable every person who is commissioned, and in full pay as an officer, or who shall be employed in enlisting. 2. No one, who has already served the office, can be, within *three* years next ensuing, chosen again, if there be any other in the county qualified for the office.[a] 3. The Stat. of Sheriffs (9 Edw. 2, c. 16) also declares, that none that is steward or bailiff to a great lord shall be made Sheriff, except he be out of office; but that he be such as can entirely attend to execute the office of Sheriff for the King and the people. 4. *By letters-patent:* there is no instance of this in our books. 5. *By disability arising from a judgment in law:* a prisoner for debt is not bound to remove his disability; but, for reasons not very intelligible on the face of the reports, or otherwise, a person excommunicated is bound to remove his disability.[b] 6. *By reason of the office being inconsistent with another:*[c] an attorney in *actual* practice is exempt on this ground; for he cannot, of necessity, be attendant on the Superior Courts and his County, at one and the same time. Lord Mansfield, in the authority referred to for this proposition, said that this exemption was the privilege of the Court of which he was an officer, and not the privilege of the attorney himself. If so, the exemption must apply, with equal force, to Sheriffs of counties as to Sheriffs of cities or towns. In the same case, it was also said that *barristers* are considered as exempt from serving the office.[d] A barrister's being in *actual* practice would, probably, be allowed, as a good excuse; but to say that a *barrister* is disabled or exempt from the office by reason of his calling, seems to be a hasty remark. The office is also incompatible with the duties of an M.P., *whenever he is the returning officer.*[e] There is no objection to a Sheriff's election for a county, city, or borough, *where he is not the returning officer.* But, by a resolution of the H. of Commons (7th Jan. 1689), "the nominating any member of the House to the King, to be made a Sheriff, is a breach of the privilege of the House."[f] A coroner made Sheriff is discharged from his office of coroner.[g] There seems to be a notion abroad, that the nobility are excluded from the office.

One who has served.

An attorney.

A barrister.

An M.P.

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[a] See 1 Rich. 2, c. 11; 23 Hen. 6, c. 7. As the 13 & 14 Vict. c. 30, has taken away the inheritable office in *Westmoreland, Middlesex* and *London* seem to be the only exceptions. No person who has once served the office in *London* and *Middlesex* is again eligible.—*Act of Common Council, 7th April,* 1748. A person who has paid the fine (unless he afterwards become an Alderman) is also for ever exempt.—*Ibid.* If one voluntarily swear that he is not worth 20,000*l.*, he is excused in *London.—Act of Common Council, 11th June,* 1799; Bac. Abr. Sheriff (B).

[b] See 2 Mod. 299.

[c] *M. of Norwich* v. *Berry,* 4 Burr. Rep. 2114.

[d] 4 Burr. 2114. Sir E. Coke was Ch. J. of the K. B., and afterwards served the office in *Buckinghamshire,* Cro. Car. 25; Dalt. Add. Ch. 2.

[e] See 4 Inst. 48; Litt. Rep. 326; Sim. Elect. p. 42.

[f] 1 Roe on Elect. 161.

[g] F. N. B. 163, n.

This is a mistake. In ancient times, the office was generally filled by noblemen, *barones, comites, duces interdum, et regum filii;* bishops, also, were not unfrequently Sheriffs.[a]

## Section III.

### BILLING OR NOMINATION OF SHERIFFS.

Sheriffs were formerly chosen by the inhabitants of the counties; and in it, as Sir W. Blackstone well observes,[b] we discover a strong trace of the democratical part of our Constitution. The election (as he also says) was, in all probability, not absolutely vested in the Commons, but required the royal approbation. For, in the Gothic constitution, the Judges of the County Courts, which office is executed by our Sheriff, were elected by the people, but confirmed by the King; and the form of these elections was thus managed: the people, or *incolæ territorii,* chose *twelve* electors, and they nominated *three* persons, *ex quibus rex unum confirmabat.* But with us, in England, these popular elections growing tumultuous, were put an end to; and the Bill or Nomination List is now made up of names returned by the Sheriff to the senior Judge on Circuit. The return should be of all who, from their means, ought to bear the duties of such an office, and should be delivered to him as other returns are. Objections, if any, are sent to him. These are read by him in the Exchequer, on the day of nomination, and allowed, or rejected, as the case may be.[c]

By the Stat. of 9 Edw. 2, st. 2, Sheriffs were to be *assigned by the Chancellor, Treasurer, Barons of the Exchequer, and by the Justices; and, in the absence of the Chancellor, by the Treasurer, Barons, and Justices.* By the 14 Edw. 3, c. 7, 23 Hen. 6, c. 8, 21 Hen. 8, c. 20, *the Chancellor, Treasurer, President of the K. in Council, Ch. Justices and Ch. Baron,* are to assign them. The Stat. of Cambridge (12 Rich. 2, c. 2,) ordains that the *Chancellor,* &c., shall be *sworn* "to act indifferently, and to name no man that sueth to be put in office, but such only as they shall judge to be the best and most sufficient." On the morrow of *St. Martin,* the Lord Chancellor, &c., assemble in the Court of Exchequer.[d] The great officers of State arrange themselves, on the Bench, on the right and left of the Ld. Ch. Baron. An officer administers an oath to them, in French, that they will nominate no one from favour, partiality, or improper motive.

Nomination in the Court of Exchequer.

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[a] Spelm. Gloss. *Vicecom.*

[b] 1 Bl. Comm. 339; Stiern. De jure Goth. l. 1, c. 3.

[c] The Lord Mayor of *London* may nominate to the Court of Aldermen at any time he thinks proper, between the 14th of April and the 14th of June in every year, one or more fit persons (not exceeding nine) being free of the city, to be publicly put in nomination; also any two or more liverymen at the day of election may nominate any freeman of the city.—*Act of Common Council,* 1748.

[d] See 1 Bl. Comm. 340, edit. Christian.

The same officer then, having the list of all the counties in alphabetical order, and a list of the names of those who were nominated the year before, except *Middlesex, Lancashire*, and *Cornwall*, reads over the *three* names, and the last of the three he pronounces to be the *present Sheriff*. If there be any objection to serve, the letter of excuse is then read, and if the excuse be allowed, another name is substituted. If there be no objection, one rises, and says, "To the two gentlemen I know no objection, and I propose A. B., Esq., in the room of the present Sheriff." Another officer has a paper, which the Clerk of the Assize for each county has transmitted to him; also another, with the names on the former list; and, whilst the three are nominated, he prefixes 1, 2, 3, to their names, according to the order in which they are placed. The Bill or Nomination list, being thus made up, is reported (by the Clerk of the Privy Council who is in attendance) to H. M. in Council. The Welsh Sheriffs are now nominated and appointed at the same time, and place, and in like manner.[a]

**Welsh Sheriffs.**

The Sheriff of the County Palatine of Lancaster is nominated and appointed by the Duchess of Lancaster (Her Majesty) in the Duchy office, generally in Hilary Term. The Sheriff of *Cornwall* is nominated and appointed by the Duke of Cornwall (H. R. H. the Prince of Wales), in the Duchy of Cornwall office. This, as well, takes place generally in Hilary Term in each year.

When the Sheriff, for the time being, dies, the Crown, by prerogative, nominates and appoints his successor, without the assembly of the officers of State, on the morrow of St. Martin. Whether the Crown can appoint one to be Sheriff, without this assembly (except in such a case); or, whether one, not on the nomination list, can be appointed, is a question that has called forth the keenest disputation.[b] The case, which gave rise to the dispute, seems to differ, from an exercise of prerogative in case of the death of the Sheriff, in degree only, and not in kind, both being cases of necessity; if so, the same necessity might, perhaps, justify the self-same exercise of prerogative at this day; but, to infer thence that there subsists a *general* power in the Crown by virtue of its prerogative, does violence to the plainest rules of right reasoning, and revives the doctrine of *non obstantes* —a doctrine "which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated *Westminster Hall*, when King *James* abdicated the kingdom."[c] The practice of occasionally naming *a pocket Sheriff*, that is to say, one not of the three on the nomination list, approved of in the Exchequer, by the sole authority of the Crown, does, however, continue; and, as regards *Ireland*, has attracted the attention of the public. "It is an ungracious prerogative, and, whenever it is exercised, unless the occasion is manifest, the whole administration of justice, throughout the county for a

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[a] 8 & 9 Vict. c. 11.

[b] Dyer, 225; Jenk. 229; 1 Bl. Comm. 342, edit. Christian; 2 Inst. 559: but see Dalt. p. 6.

[c] 1 Bl. Comm. 341.

In cities, &c.

twelvemonth, if not corrupted, is certainly suspected. The cause ought to be urgent, or inevitable, when recourse is had to this prerogative."[a] In the city of *Oxford, Berwick-upon-Tweed, Bristol, Canterbury, Chester, Exeter, Gloucester, Lichfield, Lincoln, Norwich, Worcester, York, Caermarthen, Haverfordwest, Kingston-upon-Hull, Newcastle-upon-Tyne, Nottingham, Poole and Southampton*, the Council, that is, the Mayor, Aldermen and Councillors, are on the 9th of November every year, at the quarterly meeting of the Council, and immediately after the election of the Mayor, to appoint a fit person to execute the office of Sheriff,[b] who is to hold his office until the appointment of his successor.

Pricking for Sheriffs.

The Bill or Nomination list, being thus approved of, and reported to H.M. in Council, she takes a pin, and to insure impartiality, as it is said, lets the point of it fall upon one of the three names; and the person, upon whose name it *chances* to fall, is Sheriff for the ensuing year. This is called *pricking for Sheriffs;* when done, the Statute commands that the same shall be *forthwith* notified in the London Gazette by the Clerk of the Privy Council.[c]

## SECTION IV.

### APPOINTMENT.

THE appointment for counties in England and Wales (except *Middlesex, Lancashire*, and *Cornwall*) is by *a warrant* signed by the Clerk of the Privy Council.

*Warrant of Appointment.*[d]

At the Court at —— the —— day of ——.
Present the Queen's most Excellent Majesty in Council.

To *A. B.* of, &c.

Whereas H. M. was this day pleased by and with the advice of her Privy Council to nominate and appoint you for and to be Sheriff of the county of —— during her Majesty's pleasure: These are therefore to require you to take the custody and charge of the said county and duly to perform the duties of Sheriff thereof during H. M.'s pleasure and whereof you are duly to answer according to law.

Dated this —— day of ——.

By H. M.'s command,
*C. D.*[e]

The Sheriff thereupon, and upon taking the Oath of office hereinafter mentioned, has and exercises all powers, privileges, and authorities whatsoever, usually exercised and enjoyed by Sheriffs of counties in England and Wales, without any patent, writ of assistance, or other writ whatsoever, or entering into any recognizance by himself or sureties, and without payment of, or being liable to pay, any fees whatsoever for the same.[a] The warrant must *forthwith*, after the pricking or nomination by H. M. (which usually takes place in *Hilary* Term next following), be transmitted, by the Clerk of the Privy Council, to the person so nominated and appointed. The same Officer must, within *ten days* next after the date of the warrant, transmit a duplicate thereof, to the Clerk of the Peace of the county for which such person is appointed Sheriff, to be, by the Clerk of the Peace, enrolled and kept without fee or reward. On receipt of this warrant, and *before he enter upon the execution of his office*, every one so appointed must take the oath of office. This oath must be fairly *written* on parchment (without being subject to any *stamp* duty) and *signed* by him. It may be sworn before any one of the Barons of the Court of Exch., or any one of H. M.'s Justices of the Peace for the county of which he shall be appointed Sheriff. It must, thereupon, be *filed* in the office of the Clerk of the Peace; to whom a fee of *5s.* is due for the same.

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[a] 1 Bl. Comm. 341, edit Christian.

[b] See 5 & 6 Will. 4, c. 76, s. 61, amended by 6 & 7 Will. 4, c. 105, s. 4. *Coventry* lost its Sheriff by the 5 & 6 Vict. c. 116, s. 10.

[c] 3 & 4 Will. 4, c. 99, s. 3.

[d] The appointment in a city or town, &c., may easily be framed from this.

[e] 3 & 4 Will. c. 99, Sch.

### *Oath of High-Sheriff.*

(*Not being a Roman Catholic.*)

In all counties, cities and towns *in England*.[b]

I *G. A.* do swear that I will well and truly serve the Queen's Majesty in the office of Sheriff of the county of —— and promote H. M.'s profit in all things that belong to my office as far as I legally can or may: I will truly preserve the Queen's rights and all that belongeth to the Crown; I will not assent to decrease lessen or conceal the Queen's rights or the rights of her franchises; and whensoever I shall have knowledge that the rights of the Crown are concealed or withdrawn be it in lands rents franchises suits or services or in any other matter or thing I will do my utmost to make them be restored to the Crown again; and if I may not do it myself I will certify and inform the Queen thereof or some of her Judges; I will not respite or delay to levy the Queen's debts for any gift promise reward or favour where I may raise the same without grievance to the debtors; I will do right as well to poor as to rich in all things belonging to my office: I will do no wrong to any man for any gift reward or promise nor for favour or hatred; I will disturb no man's right and will truly and faithfully acquit at the Exch. all those of whom I shall receive any debts or duties belonging to the Crown; I will take nothing whereby the Queen may lose or whereby her right may be disturbed injured or delayed; I will truly return and truly serve all the Queen's writs according to the best of my skill and knowledge; I will take no bailiffs into my service but such as I will answer for and I will cause each of them to take such oaths as I do in what belongeth to their business and occupation; I will truly set and return reasonable and due issues of them that be within my bailiwick according to their estates and circumstances and make due panels of persons able and sufficient and not suspected or procured as is appointed by the statutes of this realm; [*I have not sold or let to farm or contracted for nor have I granted or promised for reward or benefit nor will I sell or let to farm nor contract for or grant for reward or benefit by myself or any other person for me or for my use directly or indirectly my sheriffwick or any bailiwick thereof or any office belonging thereunto or the profits of the same to*

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[a] Sect. 3.

[b] *Except London* and *Middlesex*, *Cheshire* and *Durham*; 3 Geo. 1, c. 15, s. 18, confirmed by 3 & 4 Will. 4, c. 99, s. 6, and 5 & 6 Will. 4, c. 28. The Sheriff of *Cheshire* takes the same oaths as the Sheriffs of the several counties in *Wales* do, 3 Geo. 1, c. 15, s. 20. The Sheriffs of *London* and *Middlesex* and those of *Durham* take the same oath as the Sheriffs of English counties, *except* that part that relates to the placing in or disposing of any of the offices of their Under-Sheriffs, County Clerks, Bailiffs, or other Officers, or their continuance therein. *Ibid*. sect. 21. This is now the oath of the High Sheriff of *Westmoreland*, 13 & 14 Vict. c. 30.

*any person or persons whatsoever;*] I will truly and diligently execute the good laws and statutes of this realm; and in all things well and truly behave myself in my office for the honour of the Queen and the good of her subjects and discharge the same according to the best of my skill and power. *So help me God.*

[" Ye shall swear that ye shall be good and true unto our Sovereign Lady the Queen of England and unto her heirs and successors; and the franchise of the City of London within and without ye shall save and maintain to your power; and ye shall well and lawfully keep the Shires of London and Middlesex and the offices that to the same Shires appertain to be done well and lawfully ye shall do after your wit and power; and right ye shall do as well to poor as rich and good custom you shall none break ne evil custom arrere and the Assize of Bread all and all other Victuals within the franchise of this City and without well and lawfully ye shall keep and do to be kept and the judgments and executions of your Court ye shall not tarry without cause reasonable; ne right shall you none disturb. The writs that to you come touching the state and franchise of this City you shall not return till you have shewed them to the Mayor and the Council of this City for the time being and of them have advisement and ready you shall be at reasonable warning of the Mayor for keeping of the peace and maintaining the state of the City; and all other things that longen to your office and the keeping of the said Shires lawfully you shall do by you and yours; and the City you shall keep from harm after your power and the Shire of Middlesex; ne the Gaol of Newgate you shall not let to farm. As help you God.

" Ye shall also swear that ye shall freely give all such rooms and offices of Serjeants and Yeomen as shall happen to become void during the time ye shall remain in the Office of the Sheriffalty to such apt and able person and persons as shall be by you nominated to the Lord Mayor and Court of Aldermen and by them admitted without any money or other reward to be had taken or hoped for in respect thereof according to the act of Common Council made and provided in that behalf the nine and twentieth day of April in the six and twentieth year of the reign of our Sovereign Lady Queen Elizabeth. *So God you help.*"] [a]

Every Sheriff shall, except as hereinafter mentioned, within six calendar months after his election, take and subscribe the oaths of *allegiance*, *supremacy*, and *abjuration*; and also take and subscribe the *assurance* in one of the Courts at Westminster, or at the General or Quarter Sessions of the Peace, where he shall be or reside between the hours of nine and twelve in the forenoon, and no other.[b]

### *Oath of Allegiance.*[c]

I *G. A.* do sincerely promise and swear that I will be faithful and bear true allegiance to H. M. Q. Victoria. So help me God.

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[a] On *Michaelmas Day, at Guildhall*, the Sheriffs of London and Middlesex take, in addition, what is here enclosed in brackets. Sheriffs, elected at the general election day, are to appear before the Court of Aldermen, on the 14th day of Sept., after their election, to enter into an obligation to the Chamberlain of the City, in the penalty of 1000*l*. *conditioned to appear on Mich. Day at Guildhall and take this oath;* if elected between the 14th and 22nd of Sept., and they do not take the oath on Mich. Day, or, if elected at any other period, and they do not within six days after notice of election take the oath, they are liable to a penalty—if an Alderman of the City or a Commoner nominated by the Lord Mayor, to a penalty of 600*l*.; if any other freeman, to one of 400*l*. See " Pulling's Laws and Customs of London."

[b] There is, however, an indemnity act passed annually to protect persons who have omitted to take them. See 2 B. & C. 34, as to the antiquity of this oath, Co. Litt. 686.

[c] 1 Geo. 1, st. 2, c. 13, s. 1; see also 2 Geo. 1, c. 31, and 9 Geo. 1, c. 26. A neglect or refusal to take, &c., these oaths, renders the office void, 1 Geo. 1, c. 13, s. 7.

## *Oath of Supremacy.*[a]

I *G. A.* do swear that I do from my heart abhor detest and abjure as impious and heretical that damnable doctrine and position that princes excommunicated or deprived by the Pope or any authority from the see of Rome may be deprived or murdered by their subjects or any other whatsoever: And I do declare that no foreign prince person prelate state or potentate hath or ought to have any jurisdiction power superiority pre-eminence or authority ecclesiastical or spiritual within this realm. So help me God.

## *Oath of Abjuration.*[b]

I *G. A.* do truly and sincerely acknowledge profess testify and declare in my conscience before God and the world that our Sovereign Lady Q. Victoria is lawful and rightful Queen of this realm and all other H. M.'s dominions and countries thereunto belonging: and I do solemnly and sincerely declare that I do believe in my conscience that not any of the descendants of the person who pretended to be Prince of Wales during the life of the late K. James the 2nd and since his decease pretended to be and took upon himself the style and title of King of England by the name of James the 3rd or of Scotland by the name of James the 8th or the style and title of K. of Gt. Britain hath any right or title whatsoever to the crown of this realm or any other the dominions thereunto belonging: And I do renounce refuse and abjure any allegiance or obedience to any of them. And I do swear that I will bear faith and true allegiance to H. M. Q. Victoria and her will defend to the utmost of my power against all traitorous conspiracies and attempts whatsoever which shall be made against her person crown or dignity. And I will do my utmost endeavour to disclose and make known to H. M. and her successors all treasons and traitorous conspiracies which I shall know to be against her or any of them. And I do faithfully promise to the utmost of my power to support maintain and defend the succession of the crown against the descendants of the said James and against all other persons whatsoever which succession by an Act intituled "*An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject*" is and stands limited to the Princess Sophia Electress and Duchess Dowager of Hanover and the heirs of her body being Protestants. And all these things I do plainly and sincerely acknowledge and swear according to these express words by me spoken and according to the plain common sense and understanding of the same words without any equivocation mental evasion or secret reservation whatsoever. And I do make this recognition acknowledgment abjuration renunciation and promise heartily willingly and truly upon the true faith of a Christian.

## *Assurance.*[c]

I *A. B.* do in the sincerity of my heart assert acknowledge and declare that H. M. Q. Victoria is the only lawful and undoubted Sovereign of this realm as well *de jure* that is of right Queen as *de facto* that is in the possession and exercise of the government. And therefore I do promise and swear that I will with heart and hand life and goods maintain and defend her right title and government against the descendants of the person who pretended to be Prince of Wales during the life of the late King James and since his decease pretended to be and took upon himself the style and title of King of England by the name of James the 3rd or of Scotland by the name of James the 8th or the style of K. of Gt. Britain and their adherents and all other enemies who either by open or secret attempts shall disturb or disquiet H. M. in the possession and exercise thereof.[d]

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[a] See 31 Geo. 3, c. 32, s. 18.

[b] 6 Geo. 3, c. 53, s. 1. *Miller* v. *Salamons*, 7 Ex. 475, affirmed in error.

[c] 6 Geo. 3, c. 53.

[d] The Acts relating to declarations against transubstantiation were repealed by 10 Geo. 4, c. 7, s. 1. By the stat. of 9 Geo. 4, c. 17, the Acts relating to the *sacramental test* were repealed, and, in lieu thereof, a *declaration*, prescribed by the Act, is to be made and subscribed; see also 5 & 6 Will. 4, c. 28.

Instead of the oaths of *Allegiance, Supremacy,* and *Abjuration,* H. M.'s subjects professing the *Roman Catholic* religion must take the following oath:—

### *Roman Catholics' Oath.*

I *G. A.* do sincerely promise and swear that I will be faithful and bear true allegiance to H. M. Q. Victoria and will defend her to the utmost of my power against all conspiracies and attempts whatever which shall be made against her person crown or dignity; and I will do my utmost endeavour to declare and make known to H. M. her heirs and successors all treasons and traitorous conspiracies which may be formed against her or them: And I do faithfully promise to maintain support and defend to the utmost of my power the succession of the crown which succession by an Act intituled "*An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject*" is and stands limited to the Princess Sophia Electress of Hanover and the heirs of her body being Protestants hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the crown of this realm: And I do further declare that it is not an article of my faith and that I do renounce reject and abjure the opinion that princes excommunicated or deprived by the Pope or any other authority of the see of Rome may be deposed or murdered by their subjects or by any person whatsoever: And I do declare that I do not believe that the Pope of Rome or any other foreign prince prelate person state or potentate hath or ought to have any temporal or civil jurisdiction power superiority or pre-eminence directly or indirectly within this realm. I do swear that I will defend to the utmost of my power the settlement of property within this realm as established by the laws: And I do hereby disclaim disavow and solemnly abjure any intention to subvert the present Church Establishment as settled by law within this realm: And I do solemnly swear that I never will exercise any privilege to which I am or may become entitled to disturb or weaken the Protestant religion or Protestant government in the U. K.: And I do solemnly in the presence of God profess testify and declare that I do make this declaration and every part thereof in the plain and ordinary sense of the words of this oath without any evasion equivocation or mental reservation whatsoever. So help me God.

### *Oath of High Sheriff in* Wales [a] *and* Cheshire.[b]

Ye shall swear that well and truly ye will serve the Queen in the office of Sheriff of the county of C. in Wales and do the Q.'s profits that belong to you by way of your office as far forth as you can or may. Ye shall truly keep the Q.'s rights and all that belong to the crown. Ye shall not assent to decrease to lessen or to concealment of the Q.'s rights or of her franchises. And whenever ye shall have knowledge that the Q.'s rights or the rights of the crown be concealed or withdrawn be it in lands rents franchises suits or any other thing ye shall do your power to make them be restored to the Q. again and if you may not do it yourself ye shall certify the Q. or some of her council thereof such as ye hold for certain will say it unto the Q. Ye shall not respite the Q.'s debts for any gift or favour when you may raise the same without great grievance to the debtors. Ye shall truly and righteously trust the people of your sheriffwick and do right to poor as to rich in all things that belongeth to your office. Ye shall do no wrong to any man for any gift or other behest or promise of goods for favour or sale. Ye shall disturb no man's right. Ye shall truly acquit all those of whom ye shall anything receive of the Q.'s debts. Ye shall nothing take whereby the Q. may lose or whereby that right may be disturbed letted or the Q.'s debts delayed. Ye shall truly return and truly serve all the Q.'s writs as put forth as is in your cunning. Ye shall none have to be your Under-sheriff of any of the Sheriff's clerks of the last year past. Ye shall take no bailiff into your service but such as you will answer for. Ye shall make each of your bailiffs make such oath as ye make yourself in that that belongeth to their occupation. Ye shall receive no writ by you or any of yours unsealed or any sealed under the seal of any Justice saving Justice in Eyre of Justice assigned in the same shire where ye be Sheriff in or other Justices having power and authority to make any writs unto you by the laws of the land or of Justices of Newgate. Ye shall make your bailiff of the true and sufficient men of the county. Ye shall not let your sheriffwick nor any bailiwick thereof to favour to any man. Ye shall truly set and return reasonable and due issues of them that be within your bailiwick after their estate and their honour and make your panels yourself of such persons as be most meet most sufficient and not suspected nor procured as is ordained by the statute and over this in eschewing and restraint of the manslaughters robberies and other manifold grievous offences that be done daily namely by such as name themselves soldiers and other vagrant persons which increase in number and multiply so that the Q.'s subjects may not surely ride nor go to do such things as they have to do to their intolerable peril and grievance. Ye shall truly and effectually and with all diligence possible to your power execute the statutes as the statutes of Winchester and vagabonds. These things ye shall well and truly observe and keep. So help you God.[a]

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[a] Free from stamp duty, 3 & 4 Will. 4, c. 99, s. 6.

[b] The 8 & 9 Vict. c. 11, did not alter the *oath* of office; 3 Geo. 1, c. 15, s. 20.

As Jews cannot make these declarations, nor take the oaths, **Jews.** hereinbefore mentioned, they serve the office *without taking any oath at all, relying for protection on the Annual Indemnity Act.*

If a person appointed refuse to take the oaths of office, he *was* usually punished in the *Star Chamber;* now, he is proceeded against by criminal information in the Q. B.[b] A refusal to take the oaths is a refusal of the office.[c] In counties of cities and counties of towns, as in *London*, certain penalties are attached to the refusal of the office (by particular statutes or by some bye-laws); and these penalties are recoverable by action.

## SECTION V.

### HOW DETERMINED.

In the reign of Edward the Third, no one could abide in the **Time.** office, above *One Year*, without being liable to severe penalties and disabilities. But this rule was afterwards relaxed, by allowing the outgoing Sheriff, unless lawfully discharged before, to remain in office, during Mich. and Hil. Terms, after the expiration of his year of office, if the incoming Sheriff had not his patent ready, and did not take the oaths, &c. Notwithstanding the plain words of the statutes, it was held, that the appointment might be *durante bene placito.*[d] Such was the form of the ancient writ: and such is the form of the present warrant of appointment. Therefore, until a new Sheriff be appointed, the office is not determined except by demise of the Crown. In that event, he holds his office for six months, unless sooner displaced by a successor.[a]

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[a] The Oaths of Allegiance, Supremacy, and Abjuration, or instead thereof, in the case of a *Roman Catholic* subject, the oath before mentioned, must be taken in the same manner, &c., as Sheriffs of English counties are enjoined to do. The *assurance* also must be taken and subscribed in like manner.

[b] Dalt. 15; *Rex* v. *Woodrow,* 2 T. Rep. 731; *Bronker's case,* Dyer, 168, b.

[c] *Star* v. *M. of Exeter,* 3 Lev. 116.

[d] 4 Rep. 32.

Death.

In the event of the death of the present High Sheriff of any county, in *England* and *Wales*, before the expiration of his year, his *Under-sheriff* or *Deputy* shall, nevertheless, continue in office, and execute the same *in the name of the deceased Sheriff*, until another Sheriff be appointed and sworn; the Under-sheriff or Deputy is answerable for a proper discharge of the duties of his office, in all respects as the deceased Sheriff would have been, if he had been living. The security given by the Under-sheriff or Deputy to the deceased Sheriff, is to stand as a security in the meantime.[b] The Under-sheriff or Deputy is, by virtue of this statute, a *quasi* High Sheriff, and stands in that relation to the world, and to the incoming Sheriff. They usually receive their warrants of appointment in Hil. Term; but, as the appointment is *durante bene placito*, they are not necessarily made out then; and are sometimes postponed. Besides a demise of the Crown, and the death of the High Sheriff, determining the office, his office, if held for term of life, or in fee, may be forfeited and seized by the Crown; or he may be removed for misconduct.[c] So, if a militia officer, being Sheriff, be called out for actual service, he is discharged from *personally* performing the duties of the office;[d] and his Under-sheriff, during the time, is in the same condition as the Under-sheriff of a deceased High Sheriff.

Forfeiture and removal.

Relation to each other and to the world.

Let us now define the relation between the new and old Sheriff, and that between them and others. The warrant of appointment does not, of itself, affect them; it operates only as an *authority* to the incoming Sheriff to qualify himself for entering upon his office, and to take from the outgoing Sheriff a transfer of all writs, prisoners, &c. That was the effect of the patent before the 3 and 4 Will. 4, c. 99; and such, it is conceived, is that of its substitute—the Warrant of Appointment. When, and by what process, then, are their conditions changed? when, and by what process, is the one charged with, and the other discharged from, the custody of the county? The rule may be thus laid down:—*The old Sheriff is not discharged from, nor is the new Sheriff charged with, the custody of the county till two things are done, viz., the receipt of the Warrant of Appointment by the incoming Sheriff, and the delivery to the outgoing Sheriff of the signed duplicate list and account mentioned in the 7th sect. of the stat. of 3 & 4 W. 4, c. 99.*[e] The words are, "Every Sheriff of any county, city, liberty, division, town corporate, or place, shall, at the expiration of his office, *make out and deliver* to the new or incoming Sheriff, *a true and correct list and account under his hand*, of all prisoners in his custody, and of all writs, and other process in his hands, *not* wholly *executed by him*, with all such particulars as shall be necessary to explain to the said incoming Sheriff the several matters intended to be transferred to him;[*] and shall thereupon turn over and transfer to the care and custody of the said incoming Sheriff all such prisoners, writs, and process, and all records, books, and matters appertaining to the said office of Sheriff. "And the said incoming Sheriff shall, thereupon, *sign and give a duplicate of such list and accounts* to the Sheriff going out of office, to whom the same shall be a good and sufficient discharge of and from all the prisoners therein mentioned, and transferred to the said incoming Sheriff; and the further charge of the execution of the writs, process, and other matters therein contained, without any Writ of Discharge, or other writ whatsoever; and the said incoming Sheriff shall, *thereupon, stand and be charged* with the said prisoners, and also with the execution and care of the said writs, process, and other matters contained in the said list and account, as fully and effectually as if the same writs and process had been turned over by indenture and schedule. And in case any Sheriff shall refuse or neglect, at the expiration of his office, to make out, sign, and deliver such list and accounts as aforesaid, and to turn over the process aforesaid in manner aforesaid, every such Sheriff so neglecting or refusing, shall be liable to make such satisfaction by damages and costs to the party aggrieved, as he, she, or they shall sustain by such neglect or refusal." Reg. Gen. Hil. T. 1853, r. 134, provide that, "Where any Sheriff, before his going out of office, shall arrest any defendant, and take a bail bond, and make return of *cepi corpus*, he shall and may, within the time allowed by law, be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted."

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[a] 1 Ann. st. 1, c. 8.

[b] 3 Geo. 1, c. 15, s. 8.

[c] See p. 5.

[d] 2 & 3 Vict. c. 59.

[e] As to the old law, see *Filz. case*, Cro. Eliz. 28; *Wesley* v. *Skinner*, Noy, 51; 19 Vin. Abr. 451.

**Mode of transfer.**

The list may be in the following form, *mutatis mutandis* :—

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[*] See *Thomas* v. *Newnam*, 2 Dowl. N. C. 33; *Holmes* v. *Elnett*, 6 Jurist, 994; *Yrath* v. *Hopkins*, 2 Cr. M. & R. 251. A *distringas nuper vice-comitem* would seem to be necessary only where a writ *not wholly executed* has been left out of the list. Writs *wholly* executed are not transferred, *Harrison* v. *Paynter*, 6 M. & W. 391. As to the meaning of the words *wholly executed*, see *Jordan* v. *Binckes*, 13 Q. B. 760. See also *Westby's case*, 3 Rep. 72; Dalt. 15. The *King* v. *Sheriff of Middlesex*, 4 East, Rep. 607.

### ORIGINAL *List and Account*[*]

*Of the several Debtors in the Gaol at A., in the County of W., &c.*

| *Debtors.* | *At whose Suit.* | *Process.* | *Court.* | *Debt.* | *Return of Writs.* |
|---|---|---|---|---|---|
| C. W. | G. A. | Ca. sa. | Q. B. | £100 | |

*Prisoners on the Felons' Side of the Gaol.*

S. B. ...................... Convicted of —— at the last —— Assizes and sentenced to —— years' transportation.

W. T...................... Committed by M. A., Esq., on a charge of ——, and detained for trial.

*Writs unexecuted.*

| *Writs.* | *Court.* | *Plff.* | *Deft.* | *Debt.* | *When delivered.* |
|---|---|---|---|---|---|
| Ca. sa. | Q. B. | A. B. | G. T. | £100 | |
| Fi. fa. | C. P. | X. Y. | T. H. | £200 | |

As the *transfer*, &c., is seldom, if ever, made or accepted by the High Sheriff in person, the following may be the form of the

### *Power of Attorney.*

From new Sheriff to his Under-sheriff to take the transfer.

To ALL TO WHOM THESE PRESENTS SHALL COME GREETING: Whereas I *G. A.* of —— in the county of —— by H. M.'s warrant of appointment, bearing date the —— day of —— A.D. —— have been appointed High Sheriff of the said county instead of *M. A.* Esq.: NOW KNOW YE, that I have nominated constituted and appointed and do by these presents nominate constitute and appoint *T. R.* of —— in the said county gentleman for me and in my stead to receive and take from the said *M. A.* or from his Under-sheriff or from such other person or persons as he shall or may appoint for that purpose a true and correct list and account of all prisoners in his custody and of all writs and other process in his hands not wholly executed by him with all such particulars as shall be necessary to explain to me the several matters intended to be transferred to me and all records books and matters appertaining to my office of Sheriff; and further for me and in my stead to accept and receive the care and custody of all prisoners &c. and to sign and give a duplicate of such list and account to the said *M. A.* and whatever else may be necessary to carry the same into effect.

In witness whereof I have hereunto set my hand and seal this —— day of —— A.D. ——.

*G. A.*

### *Power of Attorney.*

From old Sheriff to his Under-sheriff to deliver.

To ALL TO WHOM THESE PRESENTS SHALL COME GREETING: Whereas by H. M.'s warrant of appointment *G. A.* Esq. of —— hath been duly appointed High Sheriff of the county of *C.* in my stead: NOW KNOW YE, that I have nominated constituted and appointed and by these presents do nominate constitute and appoint *J. B.* of

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[*] Or *duplicate*, as the case may be.

—— in the said county gentleman for me and in my stead to make out and deliver to the said *G. A.* Esq. a true and correct list and account of all prisoners in my custody and of all writs and other process in my hands not wholly executed by me with all such particulars as may be necessary to explain to him the several matters intended to be transferred to him and to turn over and transfer to his care and custody all such prisoners writs and process and all records books and matters appertaining to the said office of Sheriff and further for me and in my stead to accept and receive a duplicate of such list and account and all such prisoners writs process records books and matters appertaining to the said office.

In witness, &c.

## Section VI.

## UNDER-SHERIFF.

One, who has an office of trust, cannot, at common law, make *a Deputy*, without express words in his patent or grant so to do.[a]

The High Sheriff is an officer of great trust and confidence, and therefore he cannot (except he be enabled to do so by express words in his Warrant of Appointment, or by Act of Parliament[b]) make any deputy in such things as concern his *judicial* power. Nor may he let or assign over his office in any manner; for this would, in effect, be a delegation of his *judicial* powers, which cannot be. In matters concerning his *ministerial* office, he may make, or appoint under him, an Under-sheriff, bailiffs, &c., who may occupy their places in right of the High Sheriff;[c] and this he may do, although there be no express words in the Warrant of Appointment to that effect. Formerly, the High Sheriff was not obliged to appoint an Under-sheriff, but might have done all things himself. It appears, also, that the Under-sheriff might have been constituted by parol, or by writing; and at the will and pleasure of the High Sheriff; and, therefore, removable at will and pleasure, although made irrevocable. But now, "every person so appointed Sheriff as aforesaid *shall, within one calendar month* next after the notification of his appointment in the London Gazette, *by writing* under his hand, nominate and appoint *some fit and proper person*[d] to be his Under-sheriff; and shall transmit a duplicate thereof to the Clerk of the Peace for the county; to be by him filed, and which he is, by the Act, required to file among the records of his office, and for which he shall be entitled to demand and

**Appointment *in writing*.**

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[a] Dalt. Ch. 1; an *Under-sheriff* cannot appoint a *deputy* to execute a writ of trial. *Jones* v. *Williams*, 7 Dowl. P. C. 938.

[b] *As to ancient usage*, see Com. Dig., Tit. *Officer*, D. 2.

[c] Dalt. Ch. 1 & 115; and see *Kitton* v. *Fagg*, 10 Mod. 288.

[d] The 1 Hen. 5, c. 4, was repealed by 1 Vict. c. 55, s. 1. But there still remains the rule of K. B., M. T. 1654, s. 1, as to *an attorney* serving the office of Under-sheriff, and making him liable to be struck off the rolls for it. The Reg. Gen. Hil. Term, 1853, apply only to rules affecting *civil actions*. Neither can the Under-sheriff nor his deputy act as a solicitor, attorney, or agent, or sue out any process at any *general or quarter sessions* of the peace within the county, under a penalty of 50*l.*, 22 Geo. 2, c. 46. See *Faulkner* v. *Chevell*, 5 Ad. & E. 213; *Briggs* v. *Sowton*, 9 Dowl. P. C. 105.

have from such Under-sheriff the sum of *5s.* and no more; and such appointment and duplicate shall not be liable to any *stamp duty* whatever."[a]

## *Appointment.*

TO ALL TO WHOM THESE PRESENTS SHALL COME GREETING: Whereas I *G. A.* of —— in the county of *W.* have been appointed during H. M.'s will and pleasure High Sheriff of the said county by H. M.'s warrant of appointment bearing date the —— day of —— A.D. —— : NOW KNOW YE, that I have nominated constituted and appointed and by these presents do nominate constitute and appoint *M. A.* of —— in the said county, gentleman, my Under-sheriff of and for the said county and do depute and authorise him to act and to execute for me and in my stead all things to the said office of Under-sheriff in any wise appertaining or belonging. Dated this —— day of —— A.D.

*G. A.*

When one who is serving the office of High Sheriff dies, and his Under-sheriff becomes, as he does, *quasi* High Sheriff for a time, he may, in like manner, appoint a deputy.[b]

By the 3 Geo. 1, c. 15, s. 10, after reciting, that the office of Under-sheriff, and other offices and places in the disposal of the High Sheriff, had, of late years, been frequently sold, and let to farm, contrary to the several statutes theretofore made, for restraining Sheriffs from such practices, and contrary to the oath and duty of a Sheriff; for remedy thereof it was enacted "that it shall not be lawful to or for any person or persons whatsoever to buy, sell, let or take to farm the office of Under-sheriff, Deputy-sheriff, Seal-keeper, County-clerk, Shire-clerk, Gaoler, Bailiff, or any other office or place pertaining to the office of High Sheriff *of any county or shire in England or Wales;* or to contract for, promise, or grant for money or other reward or benefit, the said offices or places or any of them; nor to give, take, promise or receive any other consideration whatsoever for the said office, or any of them, directly or indirectly, by themselves or any person in trust for them, or for their use," under the penalty of 500*l.*, recoverable in a *qui tam* action, such action being commenced within two years after the offence committed. But this Act did not, in this respect, extend to *London and Middlesex, Durham,* or to the Sheriffs of any city or town being a county of itself. But by the 5 & 6 Anne, c. 31, s. 8, it was declared that "*no Sheriff of London and Middlesex* shall accept demand take or receive of his or their Under-sheriff directly or indirectly either by himself or any person or persons in trust for him or them any sum or sums of money gratuity or present whatsoever for the execution of the place of Under-sheriff."[c]

**Not to be sold, &c.**

**Security.** Formerly, it was doubted whether the High Sheriff could take a security from his Under-sheriff, to indemnify him from escapes, and the like; but, in *Norton* v. *Simmes*,[a] it was held, that he might do so. If the High Sheriff (says Dalton) will *sleep quietly*, and take *his repose in safety*, he shall do well and wisely to look for and to take *good security* from his Under-sheriff, before he do trust him with his office. Indeed, since the 3 Geo. 1, c. 15, s. 8, which provides, in case of the death of the Sheriff, that the security given by the Under-sheriff and his pledges shall stand as a security to all persons, it seems to be no longer *optional* whether a security is to be taken or not. There is the like provision in 2 & 3 Vict. c. 59, as to the Under-sheriff's security to a militia officer called out into active service.

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[a] 3 & 4 Will. 4, c. 99, s. 5.

[b] 3 Geo. 1, c. 15.

[c] Extended to *Durham* by 14 Geo. 3, c. 46, s. 1.

### *Security to High Sheriff.*

THIS INDENTURE made this —— day of —— in the —— year of the reign of our Sovereign Lady Queen Victoria and of the year of our Lord —— between *A. B.* of —— in the county of *C.* of the first part and *C. D.* and *E. F.* of the said county of the other part: Whereas the said *A. B.* by her Majesty's warrant of appointment bearing date the —— day of —— A.D. —— has been appointed High Sheriff of the said county during H. M.'s will and pleasure and hath taken upon himself the duties thereof: And whereas also at the instance of the said *C. D.* and *E. F.* the said *C. C.* hath been appointed by the said *A. B.* to be Under-sheriff of the said county for so long time as he the said *A. B.* shall remain High Sheriff thereof. In consideration whereof and in consideration of the covenants hereinafter mentioned on the part of the said *A. B.* the said *E. F.* and the said *C. D.* jointly and severally for themselves their heirs exors and admors do hereby covenant promise and agree to and with the said *A. B.* his exors and admors that he the said *C. C.* shall and will well and sufficiently perform the office of Under-sheriff during the shrievalty of the said *A. B.*; and shall and will save harmless and keep indemnified the said Sheriff his heirs exors and admors of and from all manner of actions causes of actions suits fines and amerciaments contempts and forfeitures and all other charges and incumbrances whatsoever which shall or may happen to be assessed or imposed upon the said *A. B.* as Sheriff by reason of the nonfeazance misfeazance or malfeazance of him the said *C. C.* or for or by reason of any other cause or thing whatsoever that should or ought to be done by the said Under-sheriff or by the clerks bailiffs or servants to be employed concerning the said office. And further that the said Under-sheriff shall from time to time give due notice to the said Sheriff of such personal attendance as shall be requisite to be made by him; and shall attend on and assist him thereat and be aiding and assisting in raising and levying such force within the said county as the Sheriff shall be enjoined to raise; and cause to be executed and punished all such persons as shall be convicted or attainted according to his or her sentence and well and faithfully do execute and perform all and every act matter and thing belonging to the said office of Under-sheriff.[b] And the said *A. B.* doth hereby for himself his heirs exors and admors covenant promise and agree to and with the said *C. C.* his exors and admors in manner following: that is to say, that the bonds or obligations to be entered into or given to the said Sheriff by the Gaoler or Bailiffs shall be considered as well for the indemnity of the said Under-sheriff as of the said Sheriff himself. And that the said Under-sheriff performing the aforesaid covenants shall have and enjoy the said office of Under-sheriff during the shrievalty of the said *A. B.* and keep by himself or deputy the Courts by law established in the said county and have and take all lawful fees dues profits and emoluments whatsoever belonging to the said office of Sheriff. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

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[a] Hob. 13; 2 Brownl. 283; Bac. Abr. H. 2; *Cartwright* v. *Delaworth*, Mer. 542.

[b] Any other particular covenant may be added, such as to get the accounts examined and audited; duly to transfer all writs not wholly executed, &c., at the expiration of his office, &c.

Signed sealed &c.[a]

## *Oath of Under-sheriff.*[b]

### (*Not being a Roman Catholic.*)

I *A. B.* do swear that I will well and truly serve the Q.'s M. in the office of Under-sheriff of the county of *C.* and promote H. M.'s profit in all things that belong to the crown; I will not assent to decrease lessen or conceal the Q.'s rights or the rights of her franchises; and whensoever I shall have knowledge that the rights of the crown are concealed or withdrawn be it in lands rents franchises suits or services or in any other matter or thing I will do my utmost to make them be restored to the crown again; and if I may not do it of myself I will certify and inform some of H. M.'s Judges thereof; I will not respite or delay to levy the Q.'s debts for any gift promise reward or favour when I may raise the same without great grievance to the debtors; I will do right as well to poor as to rich in all things belonging to my office; I will do no wrong to any man for any gift reward or promise nor for favour or hatred; I will disturb no man's right and will truly and faithfully acquit at the Exch. all those of whom I shall receive any debt duties or sums of money belonging to the crown; I will take nothing whereby the Q. may lose or whereby her right may be disturbed injured or delayed; I will truly return and truly serve all the Q.'s writs to the best of my skill and knowledge; I will truly set and return reasonable and due issues of them that be within my bailiwick according to their estates and circumstances; and make due panels of persons able and sufficient and not suspected or procured as is appointed by the statutes of this realm; [I have not bought purchased or taken to farm or contracted for promised or given any consideration whatsoever by myself or any other person for me or for my use directly or indirectly to any person or persons whatsoever for the office of Under-sheriff of the county of C. which I am now to enter upon and enjoy nor for the profits of the same nor for any bailiwick thereof or any other place or office belonging thereunto; I have not sold or contracted for or let to farm nor have I granted or promised for reward or benefit by myself or any other person for me or for my use directly or indirectly any bailiwick thereof or any other place or office belonging thereunto;] I will truly and diligently execute the good laws and statutes of this realm; and in all things well and truly behave myself in my said office for H. M.'s advantage and for the good of her subjects and discharge my whole duty according to the best of my skill and power. So help me God.

Oaths of Allegiance, &c.

Welsh Under-sheriffs.

The oaths of *Allegiance*, *Supremacy*, *Abjuration*, and the *Assurance*, are to be taken and subscribed, as by the High Sheriff, and within the same time; or, instead, the oath or declaration before set out.[c] With regard to the Under-sheriffs of the counties in *Wales*, there seems to be no statute requiring them to take *any oath of office*. The stat. of 27 Eliz. and 3 Geo. 1, are, in express terms, confined to S. Britain—*Wales* and *Cheshire* are excepted. But the oaths of *Allegiance*[d] and *Abjuration*[e] must be taken and subscribed by them; and *semble*, the *Assurance* must also be subscribed by them.

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[a] See Dalt. 115. The High Sheriff cannot appoint an Under-sheriff and yet abridge his power, *Norton* v. *Simmes*, Hob. 13: 2 Brownl. 283; 2 Inst. 191; Bac. Abr. *Sheriff* (H); for it is essential to a deputy to have the whole power of his principal—save only the power of making a deputy, for that implies an assignment of his whole power, which cannot be; a covenant or condition, therefore, to restrain his power, as deputy, is void; *Parker* v. *Kett*, 1 Salk. Rep. 95. On the other hand, he cannot enable him to do a thing which the Sheriff himself must do in person, 6 Co. 12; Hob. 13; Jenk. 181; 4 Lev. 76; Dyer, 133 a.

[b] 3 & 4 Will. 4, c. 99, s. 6. In the oath of the Under-sheriffs of London, Middlesex, and of all cities and towns being counties of themselves, the words in brackets are omitted.

[c] See *ante*, p. 14.

[d] W. & M. st. 1, c. 8.

[e] 13 & 14 Will. 3, c. 6; 6 Geo. 3, c. 53, s. 1; with regard to the oath of supremacy, see 31 Geo. 3, c. 32, s. 18.

His relation to the Court, to the High Sheriff.[a]

The Under-sheriff is not an officer of the Superior Court,[b] except when he is acting as *quasi* High Sheriff under the 3 Geo. 1, c. 15, s. 8, or under the Mutiny Acts. He is the *deputy* of the High Sheriff for all *ministerial*,[c] and, by Act of Parliament, for some *judicial*, purposes. He does all things in the name of his principal; and his principal is civilly answerable for his defaults, neglects, and the like.[d] As a general rule, the High Sheriff only, who is the officer of the Court, is chargeable, and not the Under-sheriff; but some Acts of Parliament make the Under-sheriff expressly liable for his own acts. The power to make Bailiffs and Precepts is a *necessary* consequence of his deputation, although the High Sheriff does not acquaint him therewith.[e] The High Sheriff cannot appoint *two* Deputy Sheriffs extraordinary.[f] All writs, &c., directed to the Sheriff, are usually delivered, at once, to the Under-sheriff, to make out the proper warrants thereon, which, as we have seen, he may do by force of his deputation.[g] He is obliged to receive them in any place, and at all times, within the county, without anything other than such fees as the law allows; and to make out warrants thereon. The delivering out warrants, before he has the writ in his custody, subjects him to a penalty of 10*l*. Under the like penalty, every warrant must have the same day and year set down thereon, as shall be set down on the writ itself.[h]

By the stat. of 42 Edw. 3, c. 9, it was enacted "that no Sheriff, Under-sheriff, nor Sheriff's Clerk, abide in his office above one year;" but, by 1 Vict. c. 55, s. 1, the above is repealed, as relates to the time during which *Under-sheriffs* and *Sheriffs' Clerks* may abide in their respective offices.

## SECTION VII.

### BAILIFFS.

Qualification.

BY the 14 Edw. 3, st. 1, c. 9, it is enacted, "that Sheriffs shall hold the same (*their counties*) in their own hands, and put in such *Bailiffs* and Hundredors, having *lands* within the said bailiwicks and hundreds, for whom they will answer." It is to be regretted that this qualification is so generally overlooked in the appointment of Bailiffs. There was formerly in use a writ called "*a ballivo amovendo,*" to remove a Bailiff from his office, for want of sufficient land in the bailiwick. In *Cumberland*[a] and *Cornwall*[b] there seems to be, in fact, no bound-bailiffs; but Ld. Kenyon, in speaking of Cumberland, says,[a] "What protection the Sheriff of Cumberland has, in cases of this kind, that other Sheriffs have not, it is not necessary to inquire in this case; but, though he may not have bound-bailiffs, he may perhaps learn, whenever the question arises, that he is bound, like all other Sheriffs, either to execute the writ personally, or to procure it to be executed by some other person, for whom he is responsible." This with equal force applies to Cornwall, and to other counties, as to the one to which it has more immediate reference. For all practical purposes, it is sufficient to divide and class them in the following manner:—1. Bound-bailiffs, *vulgariter* Bum-bailiffs.[c] 2. Special Bailiffs. 3. Bailiffs of Liberties. *Bound-bailiffs* are such as are *bound* with securities to the High Sheriff in an obligation for the due execution of their office. In London they are called Serjeants at Mace.

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[a] Bac. Abr. Tit. *Sheriff* (H); *Doe James* v. *Brown*, 5 B. & A. 243; *The Queen* v. *Dunn*, 2 Moody, C. C. 297; *The Queen* v. *Schlesinger*, 10 Q. B. 678; *Stroud* v. *Watts*, 2 C. B. 930.

[b] *Laicock's case*, Latch, 187; Noy. 90, S. C.; Com. Dig. Tit. *Viscount*.

[c] *Ante*, p. 19.

[d] *Parker* v. *Kett*, 1 Salk. 96; *Kitten* v. *Fagg*, 10 Mod. 288; *Drake* v. *Sykes*, 7 T. R. 113; Bac. Abr. Tit. *Sheriff*; Com. Dig. Tit. *Viscount*: see *post*, Ch. VI., s. 1.

[e] *Parker* v. *Kett*, *suprà*.

[f] *Denny* v. *Trepnell*, 2 Wil. 378.

[g] See 3 & 4 Will. 4, c. 42, s. 20, as to the necessity of having a *deputy* resident within one mile of the Inner Temple Hall for all such purposes.

[h] 6 Geo. 1, c. 21, ss. 53, 54 *Hall* v. *Rocke*, 8 T. R. 187.

### *Bailiff's Bond.*[d]

Know all men by these presents that we *C. D.* of —— and *E. F.* of —— are held and firmly bound to *A. B.* Esq. High Sheriff of the county of *C.* in the sum of £—— to be paid to the said *A. B.* or to his certain attorney exors admors or assigns for which payment to be well and truly made we bind ourselves and each of us our and each of our heirs exors and admors and every of them jointly and severally by these presents. Dated &c.

Whereas the said Sheriff at the request of the said *C. D.* and of his surety the said *E. F.* hath nominated and appointed the said *C. D.* to be one of the Bailiffs of the said Sheriff for so long time as he the said *A. B.* shall remain High Sheriff of ——: and whereas the said *E. F.* in consideration of the nomination and appointment of the said *C. D.* as aforesaid hath consented and agreed to execute such bond or obligation as is above written with such condition as is hereinafter expressed and contained: Now therefore the condition of the above-written obligation is such that if the said Bailiff shall duly execute all warrants or mandates to him directed by the said Sheriff Under-sheriff or deputies or any of them in the name of the said Sheriff and shall duly make a true and sufficient return in writing to all warrants which shall come to his hands as such Bailiff for execution: and also if the said Bailiff shall and will take sufficient pledges and sureties in replevin and shall and will deliver up to the said Sheriff or Under-sheriff all bonds and other securities belonging to the said Sheriff within two days after the same shall be taken; and also if the said Bailiff shall not suffer any escape or permit any prisoner in his custody as Bailiff aforesaid to go at large without a lawful authority nor permit any prisoner to go at large who shall be left with him or at his house for safe custody by the said Sheriff or any other Bailiff without the said Sheriff or his order in writing first had and obtained; and also if the said Bailiff shall give day by day instructions in writing for the Sheriff's return to each and every writ and process upon which any warrant shall have been granted to him or under or in respect of or by colour of which he shall in any way act or assume to act as Bailiff to the said Sheriff whether such writ or writs shall have been executed or not; and also if the said Bailiff shall duly execute all writs delivered to him for execution whether from a Court of law or equity; AND ALSO if the said Bailiff shall make a true return and inventory of all goods and chattels seized in execution by him as Bailiff to the said Sheriff and if he shall before removal thereof pay to the landlord the rent in arrear not exceeding one year and all taxes due in respect thereof pursuant to the statute and shall indemnify the said Sheriff on account of any mistake or default relating thereto; AND ALSO if the said Bailiff shall pay to the said Sheriff or Under-sheriff the consideration or purchase-money mentioned in every bill of sale or assignment executed by the said Sheriff or Under-sheriff at the request of the said Bailiff notwithstanding the acknowledgment of the receipt thereof by the said Sheriff contained in any such Bill of sale or assignment; AND ALSO if the said Bailiff shall and will forthwith pay to the said Sheriff or Under-sheriff all monies received by the said Bailiff on any arrest or levy by him made or with which he shall be entrusted for the said Sheriff without deduction; AND ALSO if the said Bailiff shall in all things truly and honestly demean and behave himself as Bailiff aforesaid and faithfully and diligently serve and attend the said Sheriff his Under-sheriff and their deputies and in due and lawful manner all their and every of their lawful commands or directions touching any manner of service incident or belonging to the said office of Sheriff shall and will execute and perform; AND ALSO if the said Bailiff and his sureties some or one of them shall indemnify and save harmless the said Sheriff and his Under-sheriff from all damages loss costs and charges which they or either of them shall or may suffer sustain or be put unto or be liable to suffer sustain or be put unto for or by reason of the nonfeazance malfeazance or misfeazance of the said Bailiff or for or by reason of the payment of any money by the said Sheriff Under-sheriff or deputies to any person or persons or by reason of any return to any writ of process made by the said Sheriff Under-sheriff or deputies at the request of the said Bailiff; AND ALSO if the said Bailiff and his said sureties some or one of them their or some one of their heirs executors or administrators shall and will save harmless and indemnified the said Sheriff and Under-sheriff their and each of their executors and administrators from and against all actions suits fines and amerciaments penalties contempts forfeitures loss costs charges damages and expenses which may be commenced prosecuted imposed or set upon them or either of them or which they or any or either of them may suffer pay or be liable unto for or by reason of any extortion or escape happening by the act or default of the said Bailiff or for or by reason of the executing not executing returning not returning or mis-return of any writ process mandate precept or warrant the not taking bail or pledges taking insufficient bail or pledges the not bringing into Court the body of any defendant or any other cause whatsoever happening by or arising from the act or omission of the said Bailiff then the above-written obligation shall be void otherwise to be and remain in full force and virtue.

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[a] *Hamilton* v. *Dalziel*, 2 W. Bl. 952; *Taylor* v. *Richardson*, 8 T. R. 506.

[b] *Sawle* v. *Paynter*, 1 D. & R. 309.

[c] The term is used by Serjt. Glyn in *Sanderson* v. *Baker*, 3 Wils. 309.

[d] See Dalt. ch. 115. Their power cannot be abridged, 2 Brownl. 283.

## *Bound-Bailiff's Oath.*

Before he take upon him to impanel or return any inquest, jury, or tales, or intermeddle with the execution of process, in any Court of Record, under the penalty of 40*l.*, he must receive and take the following oath, prescribed by 27 Eliz. c. 12, s. 2. It is made before the justices of assize, or one of them, of the same circuit wherein that county is whereof he shall be Bailiff; or before the *custos rotulorum*, or two justices of the peace, whereof one to be of the Quorum of the said county whereof he shall be Bailiff; or before the head officer of the place, if it be a town corporate.

I *A. B.* shall not use or exercise the office of Bailiff corruptly during the time that I shall remain therein neither shall or will accept receive or take by any colour means or device whatsoever or consent to the taking of any manner of fee or reward of any person or persons for the impanelling or returning of any inquest jury or tales in any Court of Record for the Queen or betwixt party and party above two shillings or the value thereof or such fees as are allowed and appointed for the same by the laws and statutes of this realm but will according to my power truly and indifferently with convenient speed impanel all jurors and return all such writ or writs touching the same as shall appertain to be done by my duty or office during the time that I shall remain in the said office. So help me God.

The Under-sheriff, as before observed, is the *general servant* of the High Sheriff, in all his *ministerial* duties; but, between a Bound-bailiff and a High Sheriff there is no such general connection. The true character of the Bailiff is this: he is appointed by the High Sheriff to act on each occasion of executing process wherein he is concerned; in other words, when a warrant is granted to him, he becomes the special officer of the High Sheriff *for that individual occasion, and no more.*[a] This distinction is of great importance in practice. But as the evidence to connect the Under-sheriff and Bailiff with their principal (the High Sheriff), as well as his responsibility for the wrongful acts of his Bailiff, must be fully considered hereafter, I proceed to examine the character of those who fall under the second division, namely, Special Bailiffs; premising only, in addition, with regard to the Under-sheriff's admissions, that the doctrine above laid down has been much restricted by the case of *Snowball* v. *Goodricke*,[b] wherein it was decided that admissions of the Under-sheriff are not evidence against the Sheriff, *unless they accompany some official act, or tend to charge himself.*[c] A Bound-bailiff is not *judicially* noticed by the Courts.

## SPECIAL BAILIFF.[d]

**Consequence of appointing.**

**What does not constitute such an appointment.**

A Special Bailiff is one nominated by the *plaintiff* in the cause, or by his attorney, and appointed by the High Sheriff *pro hâc vice.* For his acts, so long as the special agency continues, the High Sheriff is not responsible. Where there is an *express* appointment of a Special Bailiff, no difficulty can well arise; but where such an appointment is to be inferred from circumstances, it is otherwise; and has been the cause of much argument in the different Courts. The result of the various authorities may fairly be stated to be this: that the appointing a Special Bailiff, or the giving special directions to a Bound-bailiff, or any interference of the attorney with the execution of the process, discharges the High Sheriff from all liability, *so long as the agency of the Special Bailiff continues.*[e] And he was held discharged by the plaintiff's appointing a Special Bailiff to manage the sale, although he *returned*, that *he* had sold, and that *he* had paid the sum illegally deducted for the auction.[f] But, the *mere expression of a wish or a request* by the attorney, that an officer, *usually* employed, may execute the writ, does not constitute the latter the plaintiff's agent.[a] Whether anything said, written, or done, amounts to an appointment of a Special Bailiff, is a question of fact rather than of law.[a] After the appointment of a Special Bailiff, the Sheriff cannot be ruled to return the writ.[b]

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[a] *Drake* v. *Sykes*, 7 T. R. 113; *Brown* v. *Copley*, 2 D. & L. 336; 2 Stark. on Evid. 738; *Wilson* v. *Norman*, 1 Esp. 154.

[b] 4 B. & Ad. 541.

[c] See Ch. VI.

[d] No oath of office need be taken by him; *R.* v. *Watts*, 1 Lev. 151.

[e] See *Porter* v. *Viner*, 1 Ch. Rep. 613; *Pallister* v. *Pallister*, Ibid. n; *Balson* v. *Meggat*, 4 Dowl. 558; *Ford* v. *Leche*, 1 N. & P. 737.

[f] 1 Ch. Rep. *suprà.*

## BAILIFF OF A LIBERTY.

The Bailiff of a Liberty is one appointed by the lord of a liberty to execute process, and to do such offices therein as the common Bailiff, called in the old books Bailiff Errant, does within the county.[c]

**Relation to High Sheriff.**

**Effect of *non omittas*, &c.**

He is an independent officer;[d] yet, as there is some connection between them, arising out of the execution of process within the liberty, it is important to determine the nature of that connection; and herein also of the Sheriff's right and duty to enter the franchise. The High Sheriff, as already observed, is the immediate officer of all the Courts at Westminster; and to him, as such, all writs are directed, although relating to a thing to be done within a liberty or franchise.[e] If the writ contains what is commonly called the *non omittas* clause, the liberty is thereby made *pro hâc vice* parcel of the Sheriff's bailiwick; and the Sheriff must enter the liberty, and execute the writ there;[f] but, if the writ does not contain the *non omittas* clause, it ought to be executed by the *Bailiff of the liberty*, to whom the Sheriff directs his *mandate* for that purpose.[g] If the Sheriff's officer enter a liberty, under a writ not containing the *non omittas* clause, and there execute it, such execution is not irregular. It is, however, an infringement of the lord's rights, and he may claim compensation for the injury.[h] *In Rex* v. *Mead and another*, the indictment was, under the stat. of 43 Geo. 3, c. 58, for maliciously cutting one J. T. with an axe, with intent to murder him. The alleged crime was committed when J. T. was in the act of assisting in the execution of a warrant (the writ not containing an *omittas clause*), within the Liberty of L—— having exclusive jurisdiction in such a case. Wood, B. was of opinion that a Bailiff, under such circumstances, must be considered as a *trespasser*, and the prisoners were acquitted.[i] It seems, that when the Bailiff of a franchise is addressed as an officer or bailiff of the Sheriff, he may waive his franchise, and act upon the warrant, as an ordinary Sheriff's officer.

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[a] 1 N. & P. 737; *Anderson* v. *Davenport*, 13 M. & W. 46.

[b] *Harding* v. *Holder*, 9 Dowl. 659.

[c] See Dalt. ch. 117; Ritson's *Office of Bailiff of a Liberty;* Gilb. Hist. C. B. 25 (3rd Edit.); *Newland* v. *Cliffe*, 3 B. & Ad. 641.

[d] Dalt. ch. 117; *Boothman* v. *Surrey*, 2 T. R. 5; *Jackson* v. *Hill*, 10 Ad. & E. 484.

Dalt. ch. 40, 117; *Carrett* v. *Smallpage*, 9 East, 330; *Bowring* v. *Pritchard*, 14 East, 289.

[f] *Adams* v. *Osbaldeston*, 3 B. & Ad. 490.

[g] Ib.; *Newland* v. *Cliffe*, 3 B. & Ad. 633.

[h] Dalt. ch. 117; *Boothman* v. *Earl of Surrey*, 2 T. R. 5.

[i] 2 Stark. 207; *Patteson, J.* in *Jackson* v. *Hill*, 10 Ad. & E. 493.

In what writs inserted.

The only common law writs, containing the *non omittas* clause, are those issued by the *Court of Exchequer*.[a] The equity writs, the bankruptcy writs, issued under the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106,) are without the *non omittas* clause. The Sheriff may, *ex officio*, and without any writ of *non omittas*, enter the franchise and execute his office whenever the Queen is a party; as in every felony, or suspicion of felony, or otherwise in any action.[b] So where the High Sheriff is both judge and officer. So where the Bailiff makes no return to the Sheriff's mandate. So where the distress is taken within a franchise, and the Bailiff of the franchise will not deliver them, the Sheriff, upon complaint to him made, must enter and deliver them.[c] So by the 8 & 9 Vict. c. 72, s. 4, in executing a *capias*, or *ca. sa.*, or any other process against the *person*, the Sheriff of the county of York (whether the writ contains the *non omittas clause* or not) is bound to enter the liberty of the *Honour of Pontefract* and execute the writ. The Bailiff of a Liberty, having the return of writs, cannot arrest a man without authority from the Sheriff, derived from the writ in his hands. He must make his return to the Sheriff, and not to the Court. If he arrest one by a warrant upon a *capias*, to him directed from the Sheriff, the obligation, taken for the appearance of the party, must be made to the Sheriff and be in the Sheriff's name. Whether the Sheriff should direct his *mandate* to the lord or to the Bailiff of the franchise; or whether in the lord's name, or in that of his deputy, the returns, and other ministerial acts, are to be done, are questions that derive much light from *Newland* v. *Cliffe*:[e] it seems that where the grantee of the Crown has, *by his Bailiff*, the full return of all writs within a certain district, the mandate may be directed to the Bailiff by name, and the return made in his name; but if the grant contain no such special provision, the Bailiff is but the lord's deputy, and all things must be done in the name of the principal. It may reasonably be asked, how the High Sheriff is to know whether the grant contain such a provision or not? The answer is, that if he can obtain no certain knowledge of the fact, nor of the usual practice (which cannot well happen), the only safe course is to direct his mandate to the lord, as principal, and not to the Bailiff. All lords that have franchises, or their Bailiffs, shall attend upon the justices of assize and gaol delivery, on pain of forfeiture of their franchises;[d] and all such Bailiffs, or their deputies, must attend upon and assist the Sheriff at all courts of gaol delivery, the execution of convicts, &c.[e] When the Bailiff of a certain liberty had regularly attended the Quarter Sessions, and made returns of the jurors resident within the liberty, a fine was imposed upon him for refusing to summon a jury to attend at

How mandate directed to Lord or Bailiff.

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[a] Reg. Gen. Hil. T. Sch. 1853.

[b] Dalt. ch. 117.

[c] Ib.; *Carrett* v. *Smallpage*, 9 East, 333.

[d] Dalt. ch. 117.

[e] 3 B. & Ad. 630.

such sessions, in obedience to the Sheriff's precept, and held good.[a] A Bailiff of a Liberty is an officer *judicially* noticed by the Courts.[b]

## SECTION VIII.

### GAOLERS.

IN every county in *England* and *Wales* there must be one common gaol. The High Sheriff has, *ex officio*, the custody of it; except where it has been granted by the Crown to some person spiritual, temporal, or body corporate.[c] But, though lords of franchises, as well as the Sheriff, may have the custody of the gaol, it is still the Queen's gaol *pro bono publico*.[d] The gaoler or keeper is, except as aforesaid, appointed by the High Sheriff, and is his minister. Matrons, &c., are appointed by the Justices. The gaoler is paid by a salary fixed by the Justices, at the General or Quarter Sessions. They have, also, the power to give him, out of the public purse, a superannuation allowance. No woman can be keeper of a gaol where male prisoners are confined. He must not be an Under-sheriff nor Bailiff; nor concerned in any occupation or trade; nor can he, or any one on his behalf, sell anything to a prisoner; or have any interest in any contract for the supply of the prison.[e]

**By whom appointed, &c.**

**Disabilities.**

Since the *Gaol Consolidation Act* (4 Geo. 4, c. 64) passed, several amendments have been made, especially by the 5 Geo. 4, c. 12; 5 Geo. 4, c. 85; 6 Geo. 4, c. 40; 7 Geo. 4, c. 18; 2 & 3 Vict. c. 56; and 3 & 4 Vict. c. 25, relating to the rules and regulations of prisons, and the classification of prisoners.[f] *Inspectors of Prisons* were appointed under the 5 & 6 Will. 4, c. 38. The 3 & 4 Vict. c. 65, s. 20, relates to persons committed by the Court of Admiralty, or by Admiralty Coroners. The 10 & 11 Vict. c. 12, s. 40, relates to *military prisoners;* the 10 & 11 Vict. c. 13, s. 43, to the *marine forces;* and the 10 & 11 Vict. c. 62, s. 12, provides a *naval prison.* The *Queen's prison* is regulated by the 5 & 6 Vict. c. 22, and 11 & 12 Vict. c. 7. The Municipal Corporation Act (6 & 7 Will. 4, c. 103), and subsequent amendment Acts, provide for those within their limits.[g] Besides the gaol for matters of the Crown, he has a place of confinement for persons in his custody for matters other than for offences against public policy. This gaol, or place of confinement, is usually, but not necessarily, under the roof of the county gaol. It may be anywhere in the county, or may be removed from one place to another within his jurisdiction. Yet, he must keep his prisoner in it. For if he allow a prisoner,

**Debtors, &c.**

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[a] *Rex* v. *Jaram*, 4 B. & C. 692.

[b] *Boothman* v. *Earl of Surrey*, 2 T. R. 5.

[c] Dalt. ch. 118; and see *Rex* v. *Antrobus*, 2 Ad. & E. 791.

[d] 2 Inst. 100, 589, 705.

[e] 4 Geo. 4, c. 64.

[f] See also 5 & 6 Vict. c. 54, s. 98; 9 & 10 Vict. c. 95; 13 & 14 Vict. c. 91.

[g] See 7 Will. 4, and 1 Vict. c. 78, s. 41.

without an *Habeas Corpus*, or other proper process of removal, to go out of it, although he himself, or a keeper, be with such prisoner, he will be guilty of an escape.[a] Many Acts of Parliament seem framed on the notion that a prisoner for debt, for instance, must be taken to the common county gaol: in other words, that there is but *one* gaol.[b] But the law, as laid down in the old books, is not, I think, altered in this respect.

Sheriff's liability for his acts.

"In all *civil* causes," says Sir M. Hale,[c] "the Sheriff is to be responsible, or the gaoler at election; as if the gaoler or bailiff of a Sheriff suffers, either voluntarily or negligently, an escape of a person imprisoned for debt, the Sheriff is chargeable with an action upon the escape; for the gaoler or bailiff is the Sheriff's officer or minister, and gives him security. But if the gaoler, being placed there by the Sheriff, voluntarily suffers a felon in his custody to escape, this, in as much as it reacheth to life, is felony only in the gaoler that was immediately trusted with the custody, not in the Sheriff. But whether the escape was voluntary or negligent, yet the Sheriff may be indicted for it, so as to subject him to a great fine and imprisonment for the offence of his gaoler, though not to make him guilty of felony. For the escape must be voluntarily permitted in him that permitted it, which could not be in the High Sheriff, though it were such in the gaoler, for he was not privy to it, and therefore could not do it *felonicè*; but it was a negligent escape in him in trusting such a person with the custody of his prisoners, that would be false to his trust; and, therefore, the Sheriff shall pay, but not corporally suffer, for the miscarriage of his gaoler. But if the gaoler were a gaoler in fee, as anciently constables of castles were, the Sheriff should not answer in any kind for the default of such gaoler or constable; but now, by the stat. of 14 Eliz. c. 10, and 19 Hen. 7, c. 10, gaols of counties are rejoined to the counties. But for escapes committed by gaolers of gaols in particular franchises, as the Gatehouse at Westminster, belonging to the Dean and Chapter of Westminster, escapes there permitted concern, not the Sheriff, but the particular gaolers and lord of the franchise." The whole of this passage is given, but it must be received with caution. For in general, indeed under no circumstances, it would seem, can the Sheriff be punished *criminally* for the acts of the gaoler. Again, in *civil* matters, the maxim *respondeat superior* applies, and the superior alone can be sued.

Cannot be sold.

By 3 Geo. 1, c. 15, s. 10, "none shall buy, sell, let, or take to farm, the office of gaoler of any county or shire in England or Wales, or contract for, promise, or grant, for money, or other reward or benefit, the said office or place; nor give, take, promise, or receive any other consideration whatsoever for the said office, directly or indirectly, by themselves or any person in trust for them, or for their use, under the penalty of 500*l*."

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[a] See *Williams* v. *Mostyn*, 7 Dowl. 39.

[b] *Balder* v. *Temple*, Hob. 202; Dalt. ch. 118.

[c] 1 Hale, P. C. c. 51.

His relation to the High Sheriff.

The Sheriff may discharge him at his pleasure; and if he refuse to quit possession for 48 hours after due notice to him in that behalf, he may be ejected in manner pointed out by the 27th sect. of the stat. of 4 Geo. 4, c. 64.

By the Bankruptcy Consolidation Act, 12 & 13 Vict. c. 106, s. 274, it is declared, "that if any keeper of any prison, or any gaoler, to whose custody any bankrupt or other person shall be duly committed, shall refuse to receive such bankrupt or other person, or shall suffer him to escape, every such keeper or gaoler shall forfeit 500*l.*"

As the High Sheriff is answerable for the civil acts of the gaoler, he would do well to take good security from him.

### *Security from Gaoler.*

KNOW ALL MEN BY THESE PRESENTS that we *O. B.* of —— and *E. E.* of —— are held and firmly bound unto *A. B.* of —— Esq. High Sheriff of the county of *W.* in the sum of £—— of good and lawful money of Great Britain to be paid to the said Sheriff or his certain attorney executors administrators or assigns for the true payment whereof we bind ourselves jointly and severally our and each of our heirs executors and administrators firmly by these presents sealed with our seals. Dated this —— day of —— A.D. 18—.

WHEREAS the above-named *A. B.* hath been by H. M.'s warrant of appointment bearing date the —— day of —— A.D. 18— appointed High Sheriff for the county of *W.* aforesaid and hath at the request of the above-bounden *O. B.* authorised nominated and appointed him the said *O. B.* to be his gaoler or keeper of the gaol in and for the said county of *W.* during the Sheriffalty of the said *A. B.* with full power and authority to execute the said office in as large and ample a manner as any former gaoler or gaol-keeper have or hath heretofore lawfully executed the same. Now THE CONDITION OF THIS OBLIGATION IS SUCH that if the said *O. B.* do and shall from time to time and at all times so long as the said *A. B.* shall continue High Sheriff of the said county keep in safe custody as well all such prisoners as are now in the said county gaol as all and every prisoner or prisoners which at any time or times hereafter shall be committed sent or delivered to the said *O. B.* from or by any other person or persons having lawful power and authority in that behalf. And also if the said *O. B.* do give his attendance upon the said Sheriff at the assizes and general gaol delivery and general quarter sessions of the peace to be holden in and for the said county. And also if the said *O. B.* attend aid and assist the said High Sheriff his Under-sheriff or Deputy at all and every time and times when any execution shall be done within the said county upon any person or persons. And lastly, if the said *O. B.* his heirs executors administrators and every of them do and shall save defend and keep harmless and indemnified the said *A. B.* his heirs executors and administrators and every of them of from and against all and every escape or escapes of any prisoner or prisoners now or hereafter in his custody and from and against all and all manner of action and actions suits fines issues amerciaments forfeitures and all other costs and damages whatsoever which at any time or times hereafter shall or may arise grow or happen to be brought upon the said Sheriff for or by reason of any act or acts of nonfeazance misfeazance or malfeazance of the said *O. B.* or for any other cause relating to the said office of gaoler and keeper of the said county as aforesaid then this obligation &c.

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## SECTION IX.

## DEPUTIES IN LONDON.

BY the 3 & 4 Will. 4, c. 42, s. 20, the Sheriff of each county in England and Wales must severally name a *sufficient deputy*, who shall be resident, or have an office, within *one* mile from the *Inner Temple Hall*, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such Sheriff. A delivery of a writ, &c., to such a deputy is, in effect, a delivery to the Sheriff himself.[a] No mention is made in the Act of the *time* or *form* of naming a deputy for such purposes; *a reasonable time* will therefore be allowed for that purpose. For any laches, in that behalf, he would be liable in damages to the party aggrieved; as if an arrest was lost by such non-appointment or the like.[b]

### *Appointment.*

*W.* to wit. Sir *G. M.* Bart. High Sheriff of the county aforesaid to *M. A.* gentleman, greeting: I do hereby nominate constitute and appoint you to be my deputy for the receipt of writs granting warrants thereon making returns thereto and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to me as Sheriff as aforesaid.

Given under the seal of my office this —— day of —— A.D. 18—.

*G. M.*

## SECTION X.

### REPLEVIN CLERKS.[c]

BY the stat. 1 & 2 Ph. and M. c. 12, s. 3, for the more speedy delivery of cattle taken by way of distress, every Sheriff of *shires* (being no cities nor towns made shires), must, at his first county day, or within two months next after he has received his warrant, depute, appoint, and proclaim in the shire town within his bailiwick, four deputies at the least, dwelling not above 12 miles one distant from another, who shall have authority, in the Sheriff's name, to make replevies, and deliverance of such distresses in such manner and form as the Sheriff may and ought to do; upon pain that every Sheriff, for every month that he shall lack such deputy or deputies, shall forfeit for every such offence *5l.*

There must be an appointment to satisfy the statute, and the mere acting, as replevin clerk, will not suffice.[d] The appointment may be without deed or writing;[e] but it is generally made by a minute in the Court Book at the first County Court day. Proclamation of the appointment seems to be necessary.[f] An advertisement is usually inserted in the county newspapers of the times and places of holding the County Courts for the ensuing year; also of the names and places of abode of persons appointed Replevin Clerks.

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[a] *Harris* v. *Loyd*, 5 M. & W. 436; *Woodland* v. *Fuller*, 11 Ad. & E. 859.

[b] *Brackenbury* v. *Laurie*, 3 Dowl. 180.

[c] See *post*, Replevin.

[d] *Griffiths* v. *Stephens*, 1 Chit. Rep. 196.

[e] Dalt. ch. 116.

[f] *Bowden* v. *Hall*, 4 Q. B. 845.

## SECTION XI.

## COUNTY CLERK.

HE is appointed by the Sheriff.[a] The appointment (when made) is, in general, done by a minute in the Court Book. If the Under-sheriff reside at a distance from the place of holding the Court, the Sheriff should depute some attorney at the place to do so. The Under-sheriff is, in the 11 Hen. 7, c. 15, called Shire-clerk, or the Clerk of the County. But the County Clerk here meant is the Clerk of the County Court—the Under-sheriff's deputy.[b]

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[a] 4 Co. 33.

[b] Dalt. ch. 115.

# CHAPTER II.

## COURTS.

His *judicial* duties are next for review.

### Section I.

### SHERIFF'S TORNE.

This Court was, for centuries, the chief *criminal* Court of the kingdom. Its business is now wholly done in the Court of Quarter Sessions; being so, it is useless to pursue the inquiry further.

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### Section II.

### COUNTY COURT.[a]

Its ancient character.

This Court has shared the fate of the *Torne* as respects its former jurisdiction; both Courts seem, originally, to have had jurisdiction over criminal and civil matters. In the course of time, however, this in practice was confined to civil pleas. The reason usually assigned is, that the bishop was judge therein, together with the sheriff; and, by the common law, he was not to intermeddle in matters of blood; and Pleas of the Crown were, before the *New County Court* was established, as unknown in it, as if they had never formed a component part of its business; being confined to civil disputes between subject and subject, of a limited extent; exercising, in general, a jurisdiction concurrent with, but sometimes exclusive of, that of the superior Courts.[b]

Sheriff's duties.

Both this and the Torne are, at common law, incident and inseparable from the office of Sheriff.[c] His duties are, in general, of a ministerial, and not of a judicial nature. He is the *Registrar* of the Suitors or freeholders, who are the real *Judges* there.[d] In Pleas of the Crown, and in Exigents, the Sheriff and

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[a] See 2 Hawk. P. C. ch. 10; 2 Hale's P. C. ch. 9; Dalt. ch. 105; *Colebrooke* v. *Elliott*, 3 Burr. 1860.

[b] Co. Litt. 168; Dalt. ch. 109; 3 Bl. Comm. 35.

[c] Ibid.

[d] Dalt. ch. 109; *Tunno* v. *Morris*, 2 C. M. & R. 298; *Pitcher* v. *King*, 9 Ad. & E. 290; *Jones* v. *Jones*, 5 M. & W. 523; *Bradley* v. *Carr*, 3 Sc. N. C. 521; *Tinsley* v. *Nassau*, 2 C. & P. 582; *Brown* v. *Gill*, 2 C. B. 861.

Coroner are the Judges.[a] The Court is *not* a Court of record,[b] except as to matters of outlawry;[c] its style is, "*W. to wit, the* (1st) *County Court of M.A., Esq., Sheriff of the county aforesaid, held at C.*;" and holds plea, either by plaint, or by writ of justicies, which is in the nature of a commission out of Chancery to the Sheriff, empowering him to hold plea in any personal action (not being *vi et armis*), to any amount.[d] The jurisdiction of this Court is preserved by the 9 & 10 Vict. c. 95, s. 4 (the New County Court or Local Court Act), for all purposes, except those which shall be within the jurisdiction of the Courts holden under that act; but as it has virtually ceased to exist, a few general remarks may suffice, except in *outlawry* and *replevin*; more especially as with this newly constituted Court the Sheriff has nothing to do; except under s. 72, that is to say, except in delivering to the Clerk of the Court a list of persons liable to serve as jurors at Nisi Prius. The High Bailiff is the *quasi* High Sheriff of the New Court.

**Not of record except, &c.**

**How affected by 9 & 10 Vict. c. 95.**

**Time of holding Court.**

By the 9 Hen. 3, c. 35, and 2 Edw. 6, c. 23 (as regards *England*); as regards *Wales*, by the 34 Hen. 8, c. 26, s. 73; and as to *Chester*, by 33 Hen. 8, c. 13, not more than one *lunar* month must intervene between Court and Court;[e] and by the 7 & 8 Will. 3, c. 25, all County Courts held for the county of York, or any other County Courts which heretofore used to be held on a *Monday*, shall be called and begun upon a *Wednesday* and not otherwise, any custom or usage to the contrary notwithstanding. It may be holden *by adjournment* on a *Monday*.[f] The Court must be held on a *day certain*, because of the writs of *exigent* which are to be proclaimed and read there.[g] The Coroner is to sit with the Sheriff at every County Court to give judgment in outlawry. *In London*, judgment of outlawry is given by the Recorder in the Court of Hustings. By the common law, the Court may be holden at any place, at the pleasure of the Sheriff or Under-sheriff, so that it be within the county.[g] But it must be held at particular places, and at none other, by particular statutes. *In England*—for Northumberland, in the Town or Castle of Alnwick;[g] Sussex, at Chichester and Lewes alternately;[h] Cheshire, in the shire hall;[i] Monmouthshire, at Monmouth and Newport alternately.[k] *In Wales*—Brecknockshire, at Brecknock; Radnorshire, at New Radnor and Presteigne; Montgomeryshire, at Montgomery and Machynlleth; Denbighshire, at Wrexham.[l]

**Place.**

Plaintiff and defendant may sue or defend by attorney.[m] The

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[a] Dalt. ch. 109.

[b] 8 Co. 41; see 3 D. & L. 823.

[c] Dalt. ch. 109.

[d] Ib.; Com. Dig., Tit. *County*, C. 1.

[e] See 2 Inst. 71; Dalt. ch. 109.

[f] 18 Geo. 2, c. 18, s. 11; see *post* as to holding the Court for elections of Members of Parliament.

[g] Dalt. ch. 109.

[h] 19 Hen. 7, c. 24; Dyer, 135.

[i] 33 Hen. 8, c. 13.

[k] 27 Hen. 8, c. 26.

[l] Ibid.

[m] Dalt. ch. 109.

**Process.** process is by summons, attachment and distress infinite, or by attachment and distress in trespass.[a]

**The plaint.** The Plaint, which is the first proceeding in the suit, must be entered in writing, *sedente curiâ.* It need not be entered at length.[b] In replevin, whether in cases of distress for rent in arrear, or damage feasant, the practitioner will not forget, the proceedings are in the *District Court*, and not in the *Old County Court.*[c] **Plea.** The defendant cannot plead several matters, as the stat. of 4 & 5 Anne, c. 16, applies only to Courts of record; but he may, by the general issue, put the plaintiff on proof of all the material averments in his declaration in the first instance. If a defendant, in a suit *by plaint*, plead freehold, the Court is ousted of its jurisdiction; and anything done after that would be *coram non judice*, and void;[d] but if the suit be *by justicies*, the Court does not surcease. If issue be not joined at the next County Court, the plaintiff is to file his replication, or demurrer; if the plaintiff reply, then the defendant is to rejoin at the next Court.[e] **Issue.** Issue being joined, a jury is summoned—if by justicies. In a suit by plaint the trial is *per gager del ley*, that is, by the oath of the defendant and witnesses. By prescription even, when it is by plaint, the trial may be by jury.[f] **Execution.** Execution is by fi. fa., a ca. sa. in *Wales*;[g] or lev. fac. All suits in the County Court before the Sheriff (whether by plaint or writ), except in *Durham* and *Lancashire*, may be removed at once into the Q. B. or C. P., either at the instance of the plaintiff or defendant; in the excepted cases, they are removed into the C. P. there, and thence to the Superior Courts at *Westminster.*[h] The cause of removal is not traversable.[i]

*Before* judgment, when removed by

$$\left.\begin{array}{l}\text{Writ,}\\ \text{Plaint without Writ,}\end{array}\right\}\text{ the suit is removed by }\left\{\begin{array}{l}\text{Pone}\\ \text{Re. fa. lo.}\end{array}\right.$$

**Appeal.** *After* judgment, it is removed by Writ of False Judgment. The Court of Appeal gives such judgment as the Court below ought to have given.[k] The Superior Court will compel a Sheriff to complete his entries and certify its practice.[l] The delivery of a re. fa. lo. after interlocutory and before final judgment, is a stop to all further proceedings in the Court, and the officer cannot refuse paying obedience to it under pretence of his fees not being paid.[m]

**Replevin.** Replevin by Plaint is the creature of the stat. of Marlbridge.[n] It may be made, by *verbal precept*, without writing, and immediately *post querimoniam sibi factam*, without waiting till the next County Court. *Fitzherbert* assigns for reason "that it may be that the Sheriff nor his Bailiff cannot write, or that they may want such things wherewith they may write a warrant," &c.; but the urgency of the business seems to afford a sounder reason for considering a written precept unnecessary; for although, in former ages, few, if any, Sheriffs could write at all; yet, as it would be as difficult to find one now-a-days who could not write, as to have found one then who could; and as the Sheriff was and is obliged in some cases to write, as for instance, to make a written precept to his Bailiff to make withernam, the reason assigned seems to lose much of its force.[a] The stat. of Marlb. seems to require, that the plaint should precede the granting of the precept; and, strange to say, the 11 Geo. 2, c. 19, is silent on the point. But, the better opinion seems to be, that replevin may be made *immediately;* the reason given by Sir E. Coke is, "that it would militate against the scope of the stat. that the owners of the beasts should be deprived of the use of them until the day on which the County Court is holden."[b] Now, as to the *manner* in which it is done; for, so far, the New County Court Act (9 & 10 Vict. c. 95, s. 119) does not interfere.[c] Suppose A.'s cattle distrained, for arrears of rent, by B. his landlord, and A. resolved to replevy, to try the legality of the distress. A. takes two sufficient sureties with him to the Sheriff, Under-sheriff, or Replevin Clerk (as the case may be), and makes his plaint. He also takes with him, at the same time, some one who, of his own knowledge, can swear to the value of the things taken. The person granting the replevin administers an oath, as to the value of the cattle,[d] and satisfies himself as to the sufficiency of the sureties tendered. If satisfied that a replevy should be granted, and that the sureties are sufficient, the *replevin bond* is then filled up, and executed by the principal and his sureties. When done, a Bailiff is commanded by word of mouth, or by warrant, to redeliver the cattle to A., which is done. Frequently, when a party intends to replevy, he gives the name of two sureties to the Sheriff's *officer*, who, after satisfying himself as to their sufficiency, gives him a certificate to that effect, which certificate he takes to the person who is to grant the replevy. The same forms then are gone through as before, as to the value of the goods, &c. Though not unusual, it is, to say the least of it, unbusiness-like. Before the Sheriff or his deputy can replevy, upon writ or plaint, as before observed, he must take pledges. In Co. Litt. 145 b, it is laid down, that the Sheriff ought to take:—1. *Pledges to prosecute; 2. Pledges to return the goods.* And the 11 Geo. 2, c. 19 (*in distress for rent*) requires him to take *both.*[e] By the 11 Geo. 2, "all Sheriffs and other officers having au-

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[a] Dalt. ch. 111.

[b] See *Brown* v. *Gill*, 2 C. B. 876.

[c] *Edmonds* v. *Challis*, 7 C. B. 437.

[d] *Cannon* v. *Smalwood*, 3 Lev. 208.

[e] Com. Dig. (County, C.)

[f] Dalt. ch. 112.

[g] 34 Hen. 8, c. 26

[h] *Robinson* v. *Mainwaring*, 10 Q. B. 277.

[i] Dalt. ch. 112.

[k] *Dempster* v. *Purnell*, 4 Sc. N. R. 41.

[l] *Overton* v. *Swettenham*, 5 Dowl. 641; the original minute of the proceeding need not be returned, 3 B. & C. 453. In *Dempster* v. *Purnell*, 4 Sc. N. R. 41, the proceedings are set out at length.

[m] *Bevan* v. *Prothesk*, 2 Burr. 1152.

[n] 52 Hen. 3, c. 21.

**How made.**

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[a] Gilb. Repl. 99.

[b] 1 Inst. 145 b; 2 Inst. 139; Br. Repl. pl. 46.

[c] See *Edmonds* v. *Challis*, 7 C. B. 434.

[d] 11 Geo. 2, c. 19, s. 23; *Middleton* v. *Bryan*, 3 M. & S. 156; and see *Dunn* v. *Lowe*, 4 Bing. 193.

[e] *Perreau* v. *Bevan*, 5 B. & Cr. 248; 8 D. & R. 72.

thority to grant replevins, may and shall, in every replevin of a distress for *rent*, take in their own names from the plaintiff and two responsible persons as sureties, a bond in *double* the value of the goods distrained, such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorised and required to administer; *and conditioned* for prosecuting the suit with effect, and without delay, and for duly returning the goods and chattels distrained in case a return shall be awarded before any deliverance to be made of the distress.[a] And this statute is not, in this respect, affected by the New County Court Act.[b] Therefore, by the common law, according to which replevin for distress *damage feasant* is granted, it is still necessary that pledges to prosecute, which are merely nominal (John Doe and Richard Roe), be taken; and pledges, *pro ret. hab.* Under the 11 Geo. 2, *both* are to be taken. The form of the bond is in both the same, with this exception, that when taken on a distress *not* for rent, it is taken in the *single* value of the goods distrained; on distresses for rent, it is in *double* the value of the goods distrained. In the one case, the bond is not assignable, so as to enable the assignee to bring an action in his *own* name upon it; in the other it is. If the Sheriff take *one* pledge, on a replevin for a distress at common law, it is sufficient;[c] on a distress for rent, there must be *two*.[d] From the case of *Blacket* v. *Crissop*,[e] a conclusion, by no means warranted, has been drawn, that a bond, simply from the party replevying, satisfies the stat. of Westminster; but it is submitted that the case warrants but this inference, that such a bond is valid as between the obligee (the Sheriff) and the obligor (the party replevying), but no more. *Holt, C. J.*, puts the question in its true point of view. "The question" (says he) "will not be in this case whether the Sheriff can take a bond, instead of pledges, as it would have been if the party had brought an action against the Sheriff, for not having taken pledges, and the Sheriff had pleaded that he had taken this bond; but the question now is, whether this bond shall be void." It was an action by *Blacket* (the Sheriff) v. *Crissop* (the party replevying), on his bond. The bond was held good *inter se;* but the inclination of the Court, as to the liability of the Sheriff, if an action had been brought against him, for not having taken pledges, is clear. The sufficiency of sureties will be hereafter, in the *Action for taking insufficient Sureties in Replevin*, more fully considered. The replevin bond executed, the Under-sheriff either by word of mouth commands his Bailiff or Bailiffs, or a warrant is made out and delivered to them. Armed with this command or warrant, as the case may be, they go to the place where the cattle, goods, or chattels are. They seize them, and deliver them to the

Replevin bond.

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[a] As to the form, condition, and assignability of these bonds, see *post*, p. 40, n. (c).

[b] *Edmonds* v. *Challis*, 7 C. B. 437.

[c] *Mayser* v. *Gray*, Cro. Car. 446.

[d] *Hucker* v. *Gordon*, 1 C. & M. 58.

[e] 1 Ld. Raym. 278.

complainant or his servant, and here cease the Sheriff's duties; the proceedings in the District Court being substituted for those in the old County Court by the 9 & 10 Vict. c. 95, s. 119.[a] Not unfrequently, however, difficulties arise in making deliverance of goods so distrained. By the stat. of Westm. 1, c. 17, the Sheriff, after demand made, may break open the house of the person who has made the distress, in order to make deliverance; but, if the distress be taken *without* the liberty, and impounded *within*, the Sheriff may enter the liberty at once; because the capture was in the county and *out* of the liberty, and the right to make a deliverance is in him within whose jurisdiction the cause of complaint first arose. He may also raise the *posse comitatus* if need be.[b] If the cattle were taken and impounded in a liberty, the Sheriff should direct his warrant to the Bailiff of the Liberty; if the Bailiff of the Liberty make no answer, nor replevy, the Sheriff must enter the liberty, and replevy himself.[c] If the Bailiff return to the warrant, that the cattle are eloigned, the Sheriff awards an inquest. If, upon that inquest, they are found to be eloigned, so that the Sheriff cannot replevy them, the Sheriff issues a precept in the nature of a *capias in withernam*, commanding his officer to take goods or cattle of the defendant, to the value of those taken by him, and deliver them to the plaintiff; the plaintiff having first entered into a bond, with sureties, conditioned as in other cases.[d] If, in this *withernam*, the Bailiff return *nulla bona*, then may issue an *alias* and *pluries ad infinitum*. As no *capias* can issue, the party seems without remedy.[e] If the defendant claim property in the goods taken, the Sheriff cannot proceed to replevy, but must return, *quod defendens clamat averia, &c., esse sua*; a writ *de proprietate probandâ* thereupon issues. This writ, however, does not lie, except when the replevin is sued by *writ*. It seems that the claim of property is to be made by the defendant in person, and not by the Bailiff.[f] On the delivery of this writ to the Sheriff, he summons a jury of twelve, as in other cases, to inquire in whom the property was at the time of the taking. If they find the property was in the plaintiff, deliverance is made to him; if in the defendant, the proceedings are at an end.[g] In such a case, the very title of the cattle or goods shall be tried and given in evidence before the Sheriff.[h] The party also may challenge the jury.[i] If delivered to plaintiff, he must, according to the conditions of his bond, prosecute his suit with effect and without delay, in the district Court.[k]

**How delivery of cattle, &c., made.**

**Elongata.**

**Where defendant claims property.**

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[a] *Edmonds* v. *Challis*, 7 C. B. 437.

[b] Dalt. ch. 113.

[c] 2 Inst. 149, 194; 52 Hen. 3, c. 21; Gilb. Dist. 100.

[d] Gilb. Rep. 92; *Gwillim* v. *Holbrook*, 1 B. & P. 410.

[e] Gilb. Rep. 108.

[f] Dalt. ch. 113.

[g] Ib.; Co. Litt. 145.

[h] Fitz. Pr. 5; Dalt. ch. 113.

[i] Ibid.

[k] *Edmonds* v. *Challis*, 7 C. B. 437.

## *Oath of Value,* 11 *Geo.* 2, *c.* 19.

I *A. B.* of —— farmer make oath and say that I know the cattle goods and chattels taken and detained as is alleged and verily believe the same to be of the value of £—— and upwards.[a]

## *Warrant to Replevy.*

*W.* to wit. —— Sheriff of the county of —— to —— and —— my bailiffs and to every of them jointly and severally greeting: Whereas *A. B.* hath found me sufficient security as well for prosecuting his suit with effect against *C. D.* for taking and unjustly detaining his cattle goods and chattels to wit &c. which the said *C. D.* had taken and unjustly detains as it is said as also for making return thereof if return thereof shall be adjudged; therefore on behalf of the said *A. B.* I command you and every of you jointly and severally that without delay you replevy and cause to be delivered to the said *A. B.* his said cattle goods and chattels; and in what manner you shall have executed this precept certify to me immediately after the execution thereof. Given under the seal of my office this —— day of —— A.D. 18—.

By the Sheriff.

[*Or, if granted by a deputy, say,* " By *L. H.* one of the deputies of the said Sheriff according to the form of the statute."]

## *Replevin Bond.*[b]

Know all men by these presents that we —— are jointly and severally held and firmly bound to —— Sheriff of the county of —— in the sum of £ —— [*a suffi-*

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[a] *Ante,* 37.

[b] The Sheriff, notwithstanding the 9 & 10 Vict. c. 95, 119, still takes this bond; *Edmonds* v. *Challis,* 7 K.B. 437. Although not in all points conformable to the directions of the statute, it seems good and assignable; *Austin* v. *Howard,* 7 Taunt. 28; 2 Marsh. 352: for instance, a bond conditioned to prosecute the suit with effect and to indemnify the Sheriff is good and assignable although not conditioned likewise for prosecuting the suit without delay, *Dunbar* v. *Dunn,* 10 Price, 54; so a bond conditioned for appearance at the next County Court, prosecuting the plaint with effect, making a return if adjudged, and indemnifying the Sheriff from all charges and damages by reason of the replevin, was good and assignable, *Short* v. *Hubbard,* 2 Bing. 349. In *Miers* v. *Lockwood,* 9 Dowl., Coleridge, J., seems to have doubted whether a bond with an *indemnity* clause in it was assignable. It may be assigned to the avowant only, who may bring his action upon it without joining the party making cognizance, *Archer* v. *Dudley,* 1 B. & P. 381; or the assignment may be to both and the action joint, *Phillips* v. *Price,* 3 M. & S. 180. A defendant was not entitled to an assignment of the bond on the plaintiff's neglecting to declare at the next County Court, if he himself occasioned it; as by not appearing to the summons, and if he obtained an assignment and brought his action, the Court would stay proceedings, *Seal* v. *Phillips,* 8 Price, 17; and see *Harrison* v. *Wardle,* 5 B. & Ad. 146. If the proceedings have been stayed by injunction, and in the meanwhile the plaintiff dies, the defendant is not entitled to an assignment of the bond. The act of God will in no case work a forfeiture, 2 Q. B. *infra.* The conditions of the bond are distinct and independent of each other, and a breach of any one of them will occasion a forfeiture, *Perreau* v. *Bevan,* 8 D. & R. 88. The term prosecuting a suit *with effect* means with success, and relates to one continued prosecution of the suit, whether in the district Court or in the Court above; *Jackson* v. *Hanson,* 8 M. & W. 477; *Morris* v. *Matthews,* 2 Q. B. 300; *Rider* v. *Edwards,* 3 Sc. N. C. 463. To fulfil the condition to prosecute *without delay* the plaintiff must use due diligence, *Harrison* v. *Wardle,* 5 B. & Ad. 146; the allowing two years to elapse without proceedings amounts to a breach thereof, *Axford* v. *Perrett,* 1 M. & P. 472. If the delay be occasioned by the act of the Sheriff, the bond is not forfeited, *Harrison* v. *Wardle, supra;* but where the plaint was removed by re. fa. lo., and the plaintiff in replevin appeared, and the defendant did not, held

*cient sum to cover the value of the cattle distrained if taken damage feasant; if for rent, then double the value of the cattle taken*] to be paid to the said Sheriff or his certain attorney executors administrators or assigns; for which payment to be well and truly made we bind ourselves and each of us and each and every of our heirs executors and administrators firmly by these presents. Sealed with our seals. Dated this —— day of —— A.D. 18—.

THE CONDITION of this obligation is such that if the above-bounden *A. B.* do prosecute his suit with effect and without delay against *C. D.* for the taking and unjustly detaining of his cattle &c. to wit &c. and do return the said cattle &c. if a return thereof shall be awarded; that then this present obligation shall be void and of none effect or else to be and remain in full force and virtue.

Sealed &c.

*A. B.* (L. S.)
*G. A.* (L. S.)
*T. R.* (L. S.)

### *Assignment of Replevin Bond to be indorsed on the Bond.*

Know all men by these presents that I —— Sheriff [" Under-sheriff" *or* " Replevin Clerk"] of the county of —— do hereby at the request of the above-named *C. D.* [the avowant *or* the person making cognizance] assign over unto him the said *C. D.* the within replevin bond according to the statute in such case made and provided. Dated &c.

[Seal of office &c.] *G. A.*

Indorsed and attested under his hand and seal by the said *G. A.* in the presence of us

*E.*
*F.*

If the goods cannot be taken by the first replevin, an *alias*, a *pluries*, and then a *toties quoties* may issue. If none of these will do, then a *withernam*. The withernam thus issues: upon a return of *elongata* to the *toties quoties*, the Sheriff summons a jury, and holds an inquisition, as in other cases; and if it be so found, this precept issues to the Bailiff; and, if necessary, an *alias* and *pluries* *ad infinitum*. He must take the *posse comitatus*, if need be. Alias and pluries.

Outlawry. TO CARRY OUTLAWRY INTO EFFECT IN THIS COURT is partly the duty of the Sheriff, and partly that of the Coroner of the county; the former in a *ministerial*, the latter in a *judicial* character; the former to execute and return writs, make proclamations, &c.; the latter to pronounce judgment of outlawry.

### *Exigi Facias.*[a]

Victoria &c. to the Sheriff of —— greeting: We command you that you cause *C. D.* late of —— in the county of —— farmer to be demanded from Husting to

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that subsequent delay was not a breach of the bond. Ibid. Where an assignment was not signed by the Sheriff, but by a person accustomed to act in the Sheriff's office, in the name of the Sheriff, and under the seal of the office, it was held sufficient, *Middleton* v. *Sandford*, 4 Camp. 36.

[a] The distringas is abolished by the *Common Law Procedure Act*, 15 & 16 Vict. c. 76, s. 24. After the return of *non est inventus* to ca. sa. this writ issues; a ca. sa. for this purpose must be both tested and made returnable on a day certain in term time. It is sufficient if there be eight days between the teste and the return, Reg. Gen. Hil. T. 1853. The *exigi facias* must be tested not on the return day of the ca. sa., but on the *quarto die post* the return of the *capias;* and it must be made returnable on some day, being either the third exclusive before the commencement of Term, or between that day and the third day exclusive before the last day of the Term, according to the 1 Wm. 4, c. 3, s. 2. *Braham* v. *Hunter*, 6 D & L. 132.

Husting [*if in London; if not, say* "from County Court to County Court"] until according to the law and custom of England he be outlawed if he do not appear; and if he do appear then that you take him and him safely keep so that you may have his body before us [*C. P.* "before our justices" *Exch.* "before the barons of our said Exch."] at Westminster on —— to answer to *A. B.* in an action of *contract* at the suit of the said *A. B.* and whereupon you returned to us [*C. P.* "to our justices" *Exch.* "to our barons"] at Westminster on —— last past that the said *C. D.* was not found in your bailiwick and that he had nothing in your bailiwick by which he could be distrained and have there this writ. Witness &c.

This writ requires the Sheriff to call the party from County Court to County Court, or from Hustings to Hustings (as the case may be) till he is outlawed. If the Sheriff neither bring in the party, on a caption, or render before the outlawry, or render a complete outlawry at the time that the writ of exigent is returnable, he has not complied with the writ, nor done his duty.[a] Where there is neither a caption nor a render, the Sheriff, having the writ actually in his possession, at the respective times the party is demanded[b] *at five successive*[c] County Courts or Hustings exacts or calls the party in the following manner:—

**Mode of executing it.**

*C. D.* appear and answer *A. B.* in an action of contract [or "tort," *as the case may be*], or judgment of outlawry [*or* "waiver"] will be pronounced against you.

After the exactions have been made, the *Coroner* (the *Recorder* in London), taking the exigent in his hand, in this form pronounces upon the delinquent

### *Judgment of Outlawry.*

Forasmuch as *C. D.* the defendant named in this writ of exigent hath been duly exacted at five successive County Courts [*or* "Hustings"] and hath not appeared nor been taken or rendered his body to the Sheriff of this county of W. Therefore we pronounce him outlawed [*or* "waived"].[d]

After judgment of outlawry pronounced, the writ of exigent, together with the judgment of outlawry, is returned to the *custos brevium.* The Clerk of the Outlawries, on receiving the exigent and return thereto, will make out the *capias utlagatum.*

### *Return to Exigi Facias.*

By virtue of this writ to me directed at my County Court held at —— in and for the county of —— on —— the —— day of —— [*in London,* "at the Husting of pleas of land holden in the Guildhall of the city of London on ——"] in the year within written the within-named *C. D.* was a first time demanded and did not appear: And at my County Court held at —— aforesaid on —— the —— day of —— in the year aforesaid the said *C. D.* was a second time demanded and did not appear: And at my County Court held at —— aforesaid on —— the —— day of —— in the year aforesaid the said *C. D.* was a third time demanded and did not appear: And at my County Court held at —— aforesaid on —— the ——

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[a] *The King* v. *Yandell,* 4 T. R. 533; Plowd. 371; 3 Lev. 245; 2 B. & C. 353.

[b] *Volet* v. *Waters,* 3 D. & R. 55.

[c] 2 B. & C. *supra.*

[d] This judgment need not be signed by the Coroner. *The King* v. *Yandell,* 4 T. R. 533.

day of —— in the year aforesaid the said *C. D.* was a fourth time demanded and did not appear: And at my County Court held at —— aforesaid on —— the —— day of —— in the year aforesaid the said *C. D.* was a fifth time demanded and did not appear: Therefore by the judgment of —— Esq. coroner of our sovereign lady the Queen for the county aforesaid the said *C. D.* according to the law and custom of England is outlawed.

The answer of —— Sheriff.[a]

*If not at all in the time of the same Sheriff, thus:*

By virtue of this writ to me directed at my [&c. *and conclude his return with* "The answer of —— Sheriff" *and conclude by stating the times when called by the present Sheriff thus:*]

This writ so indorsed was delivered to me the present Sheriff by the above-named Sheriff on his going out of office.

At my County Court &c. The answer of —— Sheriff.

## *Where the Defendant appears.*

By virtue of this writ to me directed at my County Court held at —— in and for the said county of —— on —— the —— day of —— A.D. —— the within-named *C. D.* was a *first* time demanded; and then and there appeared and then rendered himself into my custody; whose body I have ready before our lady the Queen at the day and place within contained as within I am commanded.

The answer of —— Sheriff.

## *Allocatur Exigent.*

Victoria &c. to the Sheriff of —— greeting: We command you that allowing those —— County Courts [*or* "Hustings"] at which *C. D.* late of —— was demanded and did not appear as you returned to us ["to our justices" *or* "to the barons of our Exchequer"] at Westminster on —— last past you cause the said *C. D.* to be further demanded from County Court to County Court [*or* "from Husting to Husting"] until according to the law and custom of England he be outlawed if he do not appear; and if he do appear then that you take him and him safely keep so that you may have his body before us ["before our justices" *or* "before the barons of our said Exch."] at W. on —— to answer *A. B.* in an action of —— at the suit of the said *A. B.* and have there this writ. Witness &c.[b]

## *Capias Utlagatum.*

Victoria &c. to the Sheriff of —— greeting: We command you that you omit not by reason of any liberty of your bailiwick but that you enter the same and take *C. D.* late of —— being outlawed in your said county on &c. at the suit of *A. B.* in an action of —— [*if the writ issue into a county different from that in which the defendant was outlawed say* "as our Sheriff of —— returned to us (or *in C. P.* 'to our justices' *or in Exch.* 'to our barons of our Exchequer') at W. at a certain day now past"] if he shall be found in your bailiwick and him safely keep so that you may have his body before us [*or* "before our justices" *or* "before the barons of our said Exch."] at W. on &c. to do and receive what our said Court [*or* "justices" *or* "barons"] shall consider of him in this behalf and have there this writ. Witness &c.

## *Return.*

The execution of this writ appears in a certain inquisition to this writ annexed.

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[a] See *M'Taggart* v. *Wedderburn*, 2 D. & L. 580.

[b] A writ of proclamation is not necessary. Cro. Jac. 677.

## *Inquisition thereon.*

W. (to wit.) An inquisition indented taken at —— in the county of W. on the —— day of —— in the —— year of the reign of our sovereign lady Victoria before me —— Sheriff of the said county by virtue of the Queen's writ to me directed and to this inquisition annexed upon the oath of *A. B. C. D. E. F.* &c. honest and lawful men of my bailiwick who being sworn and charged to inquire of all such matters and things as in the said writ are mentioned and contained on their oath say that *C. D.* in the said writ to this inquisition annexed on —— on which day he was outlawed in the said county at the suit of *A. B.* in an action of —— whereof he is convicted was and yet is possessed of the goods and chattels following that is to say of the value of £—— as of his own proper goods and chattels [*or* "had nor hath any goods or chattels in my bailiwick to the knowledge of the said jurors"]: And the jurors aforesaid upon their oath aforesaid do further say that the said *C. D.* on —— last past (on which day he was outlawed as aforesaid) was and yet is seised *in his demesne as of fee* [*as the case may be*] of and in one messuage and 100 acres of land with the appurtenances situate in the parish of —— in the said county now in the tenure and occupation of *T. R.* of the yearly value of £—— in all issues beyond reprises: all and singular which said goods chattels tenements and premises I the said Sheriff by virtue of the said writ on the said day of the taking of this inquisition have taken and caused to be seized into the hands of our said lady the Queen as by the said writ I am commanded: And the jurors aforesaid upon their oath aforesaid do further say that the said *C. D.* on —— last past (on which day he was outlawed as aforesaid) or at any time afterwards had not nor hath he any other or more goods chattels lands or tenements in my bailiwick to the knowledge of the said jurors. In witness whereof as well I the said Sheriff as the jurors aforesaid have severally set our respective seals to this inquisition on the day and year and at the place aforesaid.

[*Signatures and seals of the Sheriff and jurors.*][a]

## *Venditioni exponas.*

Victoria &c. to the Sheriff of —— greeting: Whereas by an inquisition indented taken before you at —— in your county on the —— day of —— in the —— year of our reign by virtue of our writ of special capias utlagatum under the seal of our Court of Q. B. [*or* "C. P." *or* "Exch. of Pleas"] to you the said Sheriff directed and delivered whereby we commanded you to inquire what goods and chattels lands and tenements *C. D.* late of —— had in your bailiwick the —— day of —— then last past or at any time afterwards on which day he was outlawed in your said county at the suit of *A. B.* in an action of —— it was found by the oaths *A. B. C. D. E. F.* and other good and lawful men of your said county that *C. D.* in the said writ named on the —— day of —— then last on which day he became outlawed and on the day of taking the said inquisition was possessed as of his own proper goods and chattels of and in the several goods and chattels particularly mentioned and expressed in the schedule or inventory thereof hereunto annexed which said goods and chattels were worth to be sold the sum of £—— all which said goods and chattels you the said Sheriff by virtue of our said writ on the day of taking the said inquisition did seize and take into our hands as by the said writ and inquisition taken thereupon transcribed into our Court of Exchequer and there remaining in the custody of our remembrancer more fully appears: And we being desirous to be satisfied of the value of the said goods and chattels in the said inquisition mentioned as is just command you that you sell or cause to be sold the said goods and chattels and every part thereof for the best price that can be got for the same and at the least for the said sum of £—— at which they were so appraised as aforesaid so that you have the sum of money arising by such sale before the barons of our Exchequer at Westminster the —— day of this instant —— then and there to be paid to our use; and that you make then and there distinctly and plainly appear to our said barons all that you shall do concerning the premises; and have there this writ. Witness &c.

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[a] When the *capias utlagatum* and the Sheriff's return have been filed, a *transcript* of it is made out by him; the transcript is then taken to one of the clerks in the Exchequer, who makes out the *venditioni exponas* commanding the Sheriff to sell the goods; a *levari facias* to extend his freehold land; and a *sci. fi.* to recover debts due to the defendant; or a *sequestration* as the case may be; *Rex* v. *Hind*, 1 Dowl. 286. If the proceeds of the sale do not amount to 50*l.* the Court of Exchequer will *on motion* order the Sheriff to pay it over; if they exceed 50*l.* a petition must be sent to the Lords of the Treasury.

By the said transcript and by the barons.

### *Return thereto.*

By virtue of this writ to me directed I have caused the goods and chattels in the schedule hereunto annexed mentioned to be sold for £—— being the best price I could get for the same; which money I have before the barons of the Queen's Exchequer at W. on the day within mentioned ready to be paid to her Majesty's use according to the command of this writ.

The answer of —— Sheriff.

## Section III.

### SPECIAL COUNTY COURT FOR THE ELECTION OF CORONER.

In this Court the Sheriff is the returning officer, and the person upon whom mainly devolve the active duties of the election.

Coroners,[a] or *Crowners*, are of three kinds. Coroners:—1. Virtute officii. 2. Virtute chartæ sive commissionis. 3. Virtute electionis. The two first divisions of the subject may be passed over, because the Sheriff has no interest in their appointment; coroners *virtute electionis* alone falling within the scope of his authority. They are such as are, by stat. Westm. 1, c. 10, 3 Edw. 1, and 28 Edw. 3, c. 6, eligible and chosen in the full counties, by the commons of the same counties. This statute requires them to be *Knights;* but knighthood is not necessary, the words being introduced *diverso intuitu.*[b]

By Westm. 1, c. 10, it is enacted, "that through all shires sufficient men shall be chosen of the most loyal and wise knights which know well and may best attend upon such offices and which lawfully shall attach and present pleas of the Crown." And by 14 Edw. 3, st. 1, c. 8, it is enacted "that no coroner be chosen unless he have *land in fee sufficient in the same county whereof he may answer to all manner of people.*" The 28 Edw. 3, c. 6, which confirms to the shires the power of electing coroners, saves to the Crown and to lords of franchises their right of making coroners, as they had done before. If one prove insufficient to answer for the fines, &c., the county, as superior, must answer for his miscarriage.[c] As the coroner is chosen by writ, and not created

Qualification.

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[a] See Hawk. P. C. b. 2. ch. 9; 2 Hale's P. C. 55; 1 Bl. Comm. 346 (Edit. Christian); *Garnett* v. *Ferrand*, 6 B. & Cr. 610.

[b] See F. N. B. 164.

[c] 2 Inst. 174; 2 Hale, 56.

by patent, his office is not determined by demise of the Sovereign.[a]

In some counties, there are two coroners, in some four, in some six. In each county in Wales and in Cheshire two.[b] London, the Cinque Ports, and the Dean and Chapter of Westminster, have their own coroners. In the Stannaries in Cornwall the wardens are coroners.[c] The Bishop of Ely has the appointment of the coroners in the Isle of Ely. The coroner of the *Admiralty* is appointed by the Lord High Admiral. That of the *Verge* by the Lord High Steward for the time being.[d]

Upon the death of the coroner, or removal, the first step to be taken by the candidate who wishes to apply for the writ, is to make or get an *affidavit* of the death or removal (as the case may be) of the late coroner,—sworn before a Commissioner to administer oaths in Chancery.

### *Affidavit.*

In Chancery.

*A. B.* of the parish of *M.* in the county of *W.* gentleman maketh oath and saith that *G. T.* late one of the coroners of the said county departed this life on or about the —— day of —— last past. Sworn &c.[e] *A. B.*

### *Petition.*

To the Right Honble. the Lord High Chancellor of Great Britain.

The humble petition of us whose names are hereunto subscribed freeholders of the county of *W.* on behalf of ourselves and others freeholders of the said county

Sheweth

That *G. T.* late one of the coroners for the said county of *W.* departed this life on or about the —— day of —— as by the affidavit hereunto annexed appears. And that it will be for her Majesty's service and general good of the said county to have a proper person elected coroner in the room and stead of the said *G. T.* deceased.

Your petitioners therefore most humbly pray your lordship's order that a writ *de coronatore eligendo* do issue for the election of a new coroner for the said county of *W.* in the room and stead of the said *G. T.* deceased. And your petitioners shall ever pray &c.[f]

### *Writ de Coronatore Eligendo.*[g]

The Queen to the Sheriff &c. Because *L.* one of our coroners in your county is dead as we have received information we command you if it be so that then in your full county with the assent of the same county you cause to be chosen in the place of him the said *L.* one other coroner according to the form of the statute thereof set forth and provided who having taken the oath (as the custom is) from thence-forth shall do and keep those things which belong to the office of coroner in the county aforesaid and cause to be chosen such a person who best may know and be most able to discharge that office and make known to us his name. Witness &c.

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[a] Dyer, 165 a.

[b] 34 & 35 Hen. 8, c. 26; 2 Hale's P. C. 56.

[c] 2 Hale, 54.

[d] Ibid.

[e] The affidavit when sworn is annexed to a petition of freeholders who subscribe the same.

[f] This petition is to be subscribed by freeholders only. The petition and affidavit is to be lodged with the Clerk of the Crown in Chancery; and with whom the agent signs an undertaking prepared agreeably to the writ engaging "that due notice shall be given in all the market towns of the time and place for the execution of the writ six days before the execution." The clerk gets the writ sealed, which is to be delivered to the Sheriff.

[g] F. N. B. 163.

The 58 Geo. 3, c. 95, is repealed by the 7 & 8 Vict. c. 92, entitled "An Act to amend the Law respecting the Office of County Coroner." This Act provides for the division of the county into districts. As regards the election, and the Sheriff's duty therein, it enacts (amongst other things) "That from and after the time when any county shall have been so as aforesaid divided, every election of a coroner for any such district shall be held at some place within the district in which he shall be elected to serve the office of coroner; and that every person to be so elected shall be chosen by a majority of such persons residing within such district as shall at the time of such election be duly qualified to vote at the elections of coroners for the said county.[a] That from and after the division of any counties as aforesaid into coroners' districts, upon every election to be made of any coroner or coroners for any county, the Sheriff of the county where such election shall be made shall hold a Court for the same election at some convenient place within the district for which the election of coroner shall take place, on some day to be by him appointed, which day shall not be less than seven days nor more than fourteen days after the receipt of the writ *de coronatore eligendo*; and in case the said election be not then determined upon the view, with the consent of the electors there present, but that a poll shall be demanded for determination thereof, then the said Sheriff, or in his absence his Under-sheriff, shall adjourn the same Court to eight of the clock in the forenoon of the next day but one, unless such next day but one shall be *Saturday* or *Sunday*, and then of the *Monday* following; and the said Sheriff, or in his absence the Under-sheriff, with such others as shall be deputed by him, shall then and there proceed to take the said poll in some public place or places by the same Sheriff, or his Under-sheriff as aforesaid in his absence, or others appointed for the taking thereof as aforesaid; and such polling shall continue for two days only, for eight hours in each day; and no poll shall be kept open later than four of the clock in the afternoon of either of the said days.[b] That for more conveniently taking the poll at all elections of coroners under the authority of this act, the poll for the election of the coroner in each district shall be taken at the place to be appointed for holding the Court for such election, and at such other places within the same district as may for the time being be appointed by the Quarter Sessions.[c] That at every contested election of coroner for any district of the said county, the Sheriff, Under-sheriff, or Sheriff's deputy shall, if required by or on the behalf of any candidate on the day fixed for the election, and, if not so required, may, if it shall appear to him expedient, cause a booth or booths to be erected for taking the poll at the

**Election to be held in the district.**

**Who to elect.**

**Sheriff to hold a special county court for election of coroner.**

**If election not determined on the view, then to proceed to take a poll.**

**Duration of poll.**

**Places for taking the poll at elections for coroners.**

**Sheriff may erect polling booths for taking the poll at.**

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[a] Sect. 9.

[b] Sect. 10.

[c] Sect. 11.

No voter to poll out of the district where his property lies.

In case of a parish not included in any district.

Poll clerks to be appointed and sworn.

Inspector of poll clerk.

Electors to be sworn.

Court or principal place of election, and also at each of the polling places within the district hereinbefore directed to be used for the purposes of such election, and shall cause to be affixed on the most conspicuous part of each of the said booths the names of the several parishes, townships, and places for which such booth is respectively allotted; and no person shall be admitted to vote at any such election in respect of any property situate in any parish, township, or place, except at the booth so allotted for such parish, township, or place, and if no booth shall be allotted for the same, then at any of the booths for the same districts; and in case any parish, township, or place, or part of any parish, township, or place, shall happen not to be included in any of the districts, the votes in respect of property situate in any parish, township, or place, or any part of any parish, township, or place so omitted, shall be taken at the Court or principal place of election for such district of the said county.[a] And for the more due and orderly proceeding in the said poll, be it enacted, That the said Sheriff, or in his absence the Under-sheriff, or such as he shall depute, shall appoint such number of clerks as to him shall seem meet and convenient for the taking thereof, which clerks shall take the said poll in the presence of the said Sheriff or his Under-sheriff, or such as he shall depute; and before they begin to take the said poll, every clerk so appointed shall by the said Sheriff or his Under-sheriff, or such as he shall depute as aforesaid, be sworn truly and indifferently to take the same poll, and to set down the names of each elector, and the place of his residence, and for whom he shall poll, and to poll no elector who is not sworn, if required to be sworn by the candidates or either of them; and which oaths of the said clerks the said Sheriff or his Under-sheriff, or such as he shall depute, shall have authority to administer; and the Sheriff or in his absence his Under-sheriff, as aforesaid, shall appoint for each candidate such one person as shall be nominated to him by each candidate to be inspector of every clerk who shall be appointed for taking the poll; and every elector, before he is admitted to poll at the same election, shall, if required by or on behalf of any candidate, first take the oath hereinafter mentioned, which oath the said Sheriff, by himself or his Under-sheriff, or such sworn clerk by him appointed for taking the said poll as aforesaid, shall have authority to administer (that is to say):

"I swear [*or, being one of the people called Quakers, or entitled by law to make affirmation*, "solemnly affirm"] that I am a freeholder of the county of and have a freehold estate, consisting of lying at within the said county; and that such freehold estate has not been granted to me fraudulently or colourably on purpose to qualify me to give my vote at this election; and that the place of my abode is at [*and, if it be a place consisting of more streets or places than one, specifying what street or place*]; that I am twenty-one years of age, as I believe; and that I have not been before polled at this election [*adding, except in cases of solemn affirmations,*] So help me God.[b]

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[a] Sect. 12.

[b] Sect. 13.

"That the poll clerks shall, at the close of the poll, inclose and seal their several books, and shall publicly deliver them, so inclosed and sealed, to the Sheriff, Under-sheriff, or Sheriff's deputy presiding at such poll, who shall give a receipt for the same; and every such deputy who shall have received any such poll books shall forthwith deliver or transmit the same, so inclosed and sealed, to the Sheriff or his Under-sheriff, who shall receive and keep all the poll books unopened until the reassembling of the Court on the day next but one after the close of the poll, unless such next day but one shall be *Sunday*, and then on the *Monday* following, when he shall openly break the seals thereon, and cast up the number of votes as they appear on the said several books, and shall openly declare the state of the poll, and shall make proclamation of the person chosen, not later than two of the clock in the afternoon of the said day.[a] That all the reasonable costs, charges, and expenses which the said Sheriff, or his Under-sheriff or other deputy, shall expend or be liable to in and about the providing of poll books, booths, and clerks (such clerks to be paid not more than one guinea each for each day), for the purpose of taking the poll at any such election, shall be borne and paid by the several candidates at such election in equal proportions.[b] And whereas, in cases where the Sheriff is a party, or otherwise disqualified to act, and in various other cases, writs and processes in civil actions and suits, and also extents and other process where the Queen is interested, are frequently directed to and executed by the coroner in the place and stead of the Sheriff, but the coroner is not in any such case allowed any fee or reward for the execution of any such writs, process, or extents; be it therefore enacted, That in all cases where any writ, process, or extent whatsoever shall be directed to and executed by any coroner or coroners in the place or stead of any Sheriff or Sheriffs, such coroner or coroners shall have and receive such and the same poundage fees or other compensation or reward for executing the same as the Sheriff or Sheriffs, if he or they had executed the same, would have been entitled to receive for so doing, and shall also have such and the same right to retain, and all other remedies for the recovery of the same, as the Sheriff or Sheriffs would have had in whose place and stead such coroner or coroners shall have been substituted; and if the fees or compensation payable to the Sheriffs shall at any time after the passing of this Act be increased by Act of Parliament or otherwise, that in every such case the coroner or coroners shall be entitled to such increased fees or compensation.[c] That nothing in the Act contained touching the divisions of counties into districts, or the appointment or election of coroners, shall extend to the county of *Chester*, or any county palatine, city, borough, town, liberty, franchise, part or place, the appointment or election of coroner whereof takes

**Custody of poll books, and final declaration of the poll.**

**Expenses of Sheriff, &c., to be paid by the candidates.**

**Coroners to be paid when they act for Sheriffs.**

**To what places this Act shall not extend.**

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[a] Sect. 15.

[b] Sect. 16.

[c] Sect. 22.

place by law otherwise than under the writ *de coronatore eligendo.*[a] That nothing herein contained shall be construed to abridge or affect the royal prerogative, or the authority of the Lord Chancellor, for issuing a writ *de coronatore eligendo*, as fully as if this Act had not been passed.[b] That the Act shall extend only to *England*."[c]

Not to affect the royal prerogative.

Extent of Act.

## *Notice of Election.*

The Sheriff of the county of *W.* will at 10 o'clock in the morning of —— the —— day of —— now next ensuing hold a Court at the Moot Hall —— for the election of a coroner for the said county in the room of *G. T.* deceased at which time and place the Sheriff requests the attendance of the freeholders of the said county.

At the time and place mentioned in the above notice, the Sheriff, or, in his absence, the Under-sheriff, orders the Bailiff to make

## *Proclamation.*

All manner of persons who have anything to do at this election of coroner for the county of *W.* let them draw near and give their attendance.

Mode of holding Court.

The Sheriff, or, in his absence, the Under-sheriff, then briefly explains the object of his holding the Court, reads the writ, and asks if there be any candidate for the vacant office. The candidate is then proposed and seconded by two freeholders. If there be no contest, the election is at once determined on the view; and, after the necessary forms as to the return, &c., are perfected, the Court is dissolved in the usual way. But, if a poll be demanded, the Sheriff, or, in his absence, the Under-sheriff, must adjourn the Court to eight o'clock A.M. of the next day but one, unless that day be a Saturday or Sunday, then to the Monday following. When a poll is demanded, the Sheriff cannot refuse.[d]

Polling.

On the adjournment day, the Sheriff, or, in his absence, the Under-sheriff, with such others as shall be deputed by him, must proceed to take the poll, in some public place or places appointed for the purpose. The polling to begin at eight A.M., and to end at four P.M., and to continue for two days only. The poll is to be taken at the place to be appointed for holding the Court, and at such other places, within the district, as may, for the time being, be appointed by the Quarter Sessions. If required by or on the behalf of any candidate, on the day of election, and if not so required, he may, if it shall appear to the Sheriff expedient, cause booths to be erected for taking the poll, with the name of the different parishes affixed, each voter to poll in the district where his property lies. The voters of a parish not included in a district, are to poll at the Court or principal place.

As regards the poll clerks, inspectors of poll clerks, freeholders' oath, custody of poll books, &c., the language of the statute requires no explanation. He cannot deny a scrutiny upon a suggestion that non-freeholders have voted.[a]

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[a] Sect. 27. [b] Sect. 29. [c] Sect. 30.
[d] 1 Ventr. 206; 2 Ib. 25; Freem. 17; see next chapter.

Voter's qualification.

The two essentials of a voter's qualification are—1st, a *freehold estate*[b] (but as to quantity or value undefined by common or statute law); 2nd, *majority in age*. Upon the final declaration of the state of the poll, the Bailiff makes the following

### *Proclamation.*

If any one can gainsay why *R. W.* Gent. should not be appointed one of the coroners for this county let him come forth and he shall be heard otherwise the Sheriff of *W.* will declare the said *R. W.* duly elected.

The Sheriff then administers to the coroner elect (except he be a Roman Catholic) the oaths of allegiance, supremacy, and abjuration. If a Roman Catholic, he administers, instead thereof, that which is prescribed by the 10 Geo. 4, c. 7, s. 2. After that, he administers to him the

### *Oath of Office.*

Oath of office.

You shall swear that you will well and truly serve our sovereign lady the Queen's Majesty and her liege people in the office of a coroner and as one of her Majesty's coroners of this county of *W.* and therein you shall diligently do and accomplish all and every thing and things appertaining to your office after the best of your cunning wit and power both for the Queen's profit and for the good of the inhabitants of the said county taking such fees as you ought to take by the laws and statutes of this realm and not otherwise.

So help you God.

### *Return to Writ.*

By virtue of this writ to me directed in my full County Court held by adjournment at *A.* in the county of *W.* on the —— day of —— in the year within written by the assent of the same county I have caused *R. W.* to be chosen coroner in the place of the within named *G. T. deceased* which said *R. W.* as the manner is hath taken corporal oath [*or* "made affirmation" *or* "declaration"] to do and keep those things which to the office of coroner in the said county doth belong as I am within commanded.

The answer of —— High Sheriff.

## SECTION IV.

### SPECIAL COUNTY COURT FOR ELECTION OF KNIGHTS OF THE SHIRE.

Duties.

IN this Court the High Sheriff's duties were formerly of a mixed nature.[c] But since the statutes of 6 & 7 Vict. c. 18, they seem to be exclusively *ministerial*.[d]

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[a] 1 Ventr. 206; 2 Ib. 25; Freem. 17.

[b] 2 Hawk, P. C. c. 9, s. 10; 2 Roll. Abr. 121; 2 Inst. 99.

[c] *Cullen* v. *Morris*, 2 Stark. Rep. 577; *Ashby* v. *White*, 1 Smith's L. C. 105.

[d] See *Pryce* v. *Belcher*, 3 C. B. 58; 4 Ib. 866, S. C.

To summon the Parliament appertains to the Queen; for hers is the only branch of the legislature that has a separate existence, when no Parliament is in being.[a] And, therefore, in case of a new Parliament, the House of Commons is convened by virtue of an order [b] (formerly by warrant) from H. M. in Council, to the Lords High Chancellors of Great Britain and Ireland, to issue out writs to the Sheriffs of every county for the election of all the members to serve for the county, and for every city and borough therein. After the Parliament is assembled, and during its continuance, the House of Commons *alone* has the power of issuing writs to fill up any vacancy occasioned by death, resignation, bankruptcy, removal by a committee of the house, acceptance of office, elevation to a peerage, or the like.[c] In the event of a vacancy during its continuance, therefore, on the motion of a member, the Speaker sends his warrant to the Clerk of the Crown, directing a new writ to be made and issued. If a vacancy be caused by death, or promotion to the peerage, during any recess of the House, whether by prorogation or adjournment, the Speaker (or his deputy) forthwith, on receiving a certificate under the hands of two members, causes notice thereof to be inserted in the London Gazette, and at the expiration of fourteen days after the insertion of such notice in the Gazette, issues his warrant, as in other cases (subject to the *restrictions* imposed by the statute of 24 Geo. 3, c. 26 [d]). In case of an adjudication of bankruptcy against a member of the House of Commons, and the fiat be not annulled, within twelve months, nor debts paid, nor security given for debts disputed and costs, the major part of the Commissioners shall, at the expiration of the twelve months, certify the same to the Speaker, and the election of such member shall be declared void.

**How writ issues.**

### *Writ on General Election.*

Victoria &c. to the Sheriff of the county of —— greeting: Whereas by the advice and assent of our council for certain arduous and urgent affairs concerning us the state and defence of our kingdom of Great Britain and the Church we have ordered a certain parliament to be holden at our city at Westminster on the —— day of —— next ensuing and then to treat and have conference with the prelates great men and peers of our realm: We command and strictly enjoin you that (proclamation being made of the day and place aforesaid) two knights of the most fit and discreet of the said county girt with swords [and of the University of Oxford two burgesses and of the city of Oxford two citizens; and of the borough of *W.* one burgess and of the borough of *B.* one burgess] of the most sufficient and discreet freely and indifferently * by those who at your County Court to be holden for the purpose of the election shall be present according to the form of the statutes in that case made and provided you cause to be elected; and the names of those knights citizens and burgesses so to be elected (whether they be present or absent) you cause to be inserted in certain indentures to be thereupon made between you and those who shall be present at such election and then at the day and place aforesaid you cause to come in such manner that the said knights for themselves and the commonalty of the said University city and boroughs respectively may have from them full and sufficient power to do and consent to those things which then and there by the common council of our said kingdom (by the blessing of God) shall happen to be ordained upon the aforesaid affairs so that for want of such power or through an improvident election of the said knights citizens and burgesses the aforesaid affairs may in no wise remain unfinished; *willing nevertheless that neither you nor any other Sheriff of this our said kingdom be in any wise elected* and that the election in your full county is made distinctly and openly under your seal and the seals of those who shall be present at such election you do certify to us in our Chancery at the day and place aforesaid without delay remitting to us one part of the aforesaid indentures annexed to these presents together with this writ.[a] Witness ourself at Westminster the —— day of —— in the ——.

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[a] 1 Bl. Com. 15.

[b] D'Ewes, 2; 1 Roe on Elect. 346, n.

[c] D'Ewes Jour. 307, 308; *Shaftesbury case*, 2 Hats. 233.

[d] Previously to the 10 Geo. 3, c. 41, there appears to have existed no power to order the issuing of a writ during a recess, 4 Cobb. Parl. Deb. 511.

## *Writ on New Election.*

Victoria &c.: Whereas *C. H.* Esq. was lately chosen burgess for the borough of *R.* in your county for the present parliament summoned to be holden in our city of *W.* the —— day of —— now last past and from thence by our several writs prorogued to and until Tuesday the —— day of —— in the —— year of our reign and there now holden: And whereas the Lower House of our said parliament have adjudged the election of the said *C. H.* to be void [*or* "the said *C. H.* is since dead" *as the case may be*] as by the letter of our right trusty and well beloved councillor —— Speaker of your Lower House of Parliament more fully and plainly appears: By means whereof our subjects of the said borough are deprived of a burgess to treat for the benefit of the said borough in our said parliament; nevertheless we being unwilling that the commonalty of our kingdom in our said parliament assembled to treat of the business concerning us the state and defence of our kingdom and the Church from the aforesaid cause should be diminished or lessened whereby those affairs may not have a due end: We command you that in the place of the said *C. H.* within the borough aforesaid one other fit and discreet burgess of the aforesaid borough (proclamation being first made of the premises and of the day and place) freely and indifferently &c. [*as in last precedent from asterisk*].[b]

The writs, whether upon a new parliament, or upon vacancies during parliament, are forthwith, after the receipt thereof, taken by the messenger, or pursuivant of the great seal or his deputy, to the General Post Office in London; and there delivered to the Postmaster or Postmasters General, or to such other person as he or they shall depute to receive the same (which deputation is required to be made), who, on receipt of the writs, is to give an acknowledgment in writing to the person from whom they were received, expressing therein the time of such delivery, and shall keep a duplicate of such acknowledgment signed by both parties.[c] The statute requires that the writs be dispatched free of postage, by the first post or mail after the receipt thereof, under covers respectively directed to the proper officer or officers, and accom-

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[a] 7 Hen. 4, c. 15.

[b] 2 Peckw. Elect. Ca. 254. *The writs* are made out by the Clerk of the Crown in Chancery, and, after the election of the members, *returned* into the Crown Office. By the 7 & 8 Will. 3, c. 25, s. 1, "upon every *new* parliament there shall be *forty* days between the teste and return of the writs of summons;" in practice, however, *fifty* days intervene, in consequence of the 22nd article in the treaty of Union with Scotland. With regard to the issuing and return of writs issued *on vacancies*, there is no precise interval fixed by law, nor any day mentioned in the writs when the members returned are to attend in parliament. The writs are *directed* as in other cases.

[c] 53 Geo. 3, c. 89.

*Duties before Election.*

panied with proper directions to the postmaster or deputy postmaster of the town or place, or nearest to the town or place, where such officer or officers shall hold his or their office,[a] requiring him, forthwith, to carry such writs to such office, and deliver them to the officer to whom they are directed, or to his deputy; who is to give a memorandum, under his hand, to such postmaster, acknowledging the receipt of such writ, and setting forth the day and hour when the same was delivered. This memorandum is to be signed by such postmaster, by whom it is to be transmitted, by the first or second post afterwards, to the Postmaster-General at the General Post Office in London, who is to make an entry thereof in a book for that purpose; and to file such memorandum, along with the duplicate of the messenger's acknowledgment, that the same may be inspected or produced by any person interested in such election. The writs to the Sheriffs of London and Middlesex, and all other officers whose office is in London, Westminster, or Southwark, or within five miles thereof, which are to be delivered at their offices by the messenger of the great seal, are excepted. Every person, concerned in the delivery of any writ, who shall wilfully neglect or delay to deliver it, is to be deemed guilty of a misdemeanour.[b]

Proclamation, &c.

The Sheriff, on receiving the writ, must indorse thereon the day of receiving it; and give a receipt in writing to the person delivering it to him, specifying the day and hour of delivery. He must, within two days after the receipt thereof, cause proclamation to be made, at the place where the ensuing election ought by law to be holden, of a special County Court to be there holden for the purpose of the election only, on any day (Sunday excepted) not later from the day of making such proclamation than the 16th, nor sooner than the 10th day.[c]

### *Indorsement.*

The within writ was delivered to me on —— the —— day of —— A.D. 18—.

*G. A.* High Sheriff.

### *Receipt.*

Received the writ of election for the county of —— from —— at —— o'clock in the morning of —— the —— day of —— last past.

*G. A.* High Sheriff.

### *Proclamation.*

The Sheriff of the county of —— will at —— o'clock in the morning of —— the —— day of —— now next ensuing hold a Court at the Shire Hall A. for the purpose of electing a Knight of the Shire of the said county: at which time and place all freeholders and others entitled to vote at the said election are requested to give their attendance.

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[a] Returning officers are to inform the Post Office of their residences.

[b] Sect. 6.

[c] The 3 & 4 Vict. c. 81, applies to cities, towns, and boroughs, and not to *counties*.

***Duties before Election.***

The proclamation, and notices of election, must be given publicly, at the usual place or places, within the hours of eight o'clock in the forenoon, and four o'clock in the afternoon, from the 25th day of Oct. to the 25th day of March inclusive, and within the hours of eight and six from the 25th of March to the 25th of Oct. inclusive, and not otherwise; and, in default of observing this, the election is utterly void.[a] A Committee of the House of Commons will not, however, declare an election *void* for any irregularity in this respect, unless it appears that the result has been affected by it.[b]

**Place.**

**Time.**

The Court, for the purpose of election in counties not divided by the Division and Boundary Act,[c] must be held at the most usual place of election during the forty years immediately preceding, except where otherwise specified by statute, as in the following counties:—Brecknock, at Brecknock; Radnor, at New Radnor or Rothergorry; Montgomery, at Montgomery or Machynlleth; Denbigh, at Denbigh or Wrexham; Monmouth, at Monmouth or Newport;[d] Glamorgan, at Bridgend.[e] The Court, in counties divided, must be held at the places mentioned in the Division and Boundary Act, or at any place in the neighbourhood of the place appointed by that Act, at which such Court may have, before the Reform Act, been held, or which may be convenient for that purpose, according to the discretion of the Sheriff.[f] Additional polling places have been appointed under the 6 & 7 Will. 4, c. 102.

**Polling booths.**

**Register of voters.**

At each polling place (in a *county* election) as many polling booths must be provided as will allow one for every 450 electors. There must be affixed, upon the most conspicuous part of each of the said booths, the names of the several parishes, townships, and places, for which such booth is allotted.[g] Likewise for the use of each booth the Sheriff must, before the day fixed for the election, cause to be made a true copy of the register of voters; and shall under his hand certify every such copy to be true.[h] The polling booths are erected at the joint expense of the several candidates; that is to say, by contract with them, if they shall think fit to make such contract; if not, to be erected by the Sheriff, at their expense, subject to limitation. As the Sheriff's power to erect booths is not absolute, but conditional only, inasmuch as it arises only on the default of the candidates themselves not contracting, a formal request should, in prudence, be made upon them to do so; for, in suing any candidate for his proportion, it must be averred and proved (if denied) that the candidates did not contract. If any person be proposed, without his consent, the pro-

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[a] 33 Geo. 3, c. 64; Simeon, Elect. "*Notices.*"

[b] Athlone, Bar. and Arn. 119; Clerk, Law of Election Committees, 78.

[c] 2 & 3 Will. 4, c. 64.

[d] 27 Hen. 8, c. 26.

[e] 35 Geo. 3, c. 72. As to the *polling* places in these counties, see Schedule N., 2 & 3 Will. 4, c. 64.

[f] Sect. 34.

[g] 2 Will. 4, c. 45, s. 64. In case a "*parish*" or "*township*" be omitted where the poll is to be taken, see s. 64.

[h] Sect. 72.

*Duties before Election.*

poser, *quoad* the expense, is liable as a candidate.[a] The expense of the booth or booths to be erected at the principal place of election, or at any of the polling places, must not exceed 40*l.*, in respect of such principal place of election, or of any one such polling place. The Sheriff may, if he think fit, instead of erecting booths, procure, or hire, and use, any houses or other building for the purpose of taking the poll therein; subject, always, to the same regulations, provisions, liabilities, and limitations of expense, as booths are subject to. The Sheriff has power to appoint deputies to preside, and clerks to take the poll at the principal place of election; and also at the several places appointed for taking the poll for any county, or any riding, parts, or division of a county. The former to be paid each two guineas a day, the latter one guinea. The Sheriff, as returning officer, is to administer to the poll clerks the following oath, before beginning to take the poll:—

Deputies and poll clerks.

## *Poll Clerk's Oath.*

I *A. B.* do swear that I will at this election of a member [*or* "members"] to serve in parliament for [the eastern division of] the county of *C.* truly and indifferently take the poll and set down the name of each voter and his addition profession or trade and the place of his abode and for whom he shall poll. And to poll no voter who is not sworn or put to his affirmation if legally required.[b]

Commissioners for administering oaths.

The Sheriff, as returning officer, or his deputy, may also appoint a commissioner or commissioners to each polling place, for the purpose of administering the oaths required to be taken by electors.[c] But as deputies have the same power of administering the oaths or affirmations required by law, as the High Sheriff himself has, this appointment will seldom be made.

The High Sheriff, or, in his absence, the Under-sheriff, is authorised to appoint for each candidate such one person as shall be nominated to him by each candidate to be inspector of every clerk who shall be appointed for taking the poll.[d] There must be provided for each booth a sufficient attendance of constables or peace officers. What is a sufficient attendance will depend on a variety of circumstances not to be decided here.[e] Where booths are erected and poll clerks appointed, the Sheriff is to allow a *cheque book* for every poll book, for each candidate, to be kept by their respective inspectors, at every place where the poll for the election shall be carried on.

Inspectors of poll clerks.

Cheque books.

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[a] Sect. 71.

[b] 7 & 8 Will. 3, c. 25; but the omission does not *avoid* the election. 1 Peckw. 506.

[c] 34 Geo. 3, c. 73; 43 Geo. 3, c. 63.

[d] 7 & 8 Will. 3, c. 25, s. 3. All these appointments may be, and usually are, by *parol.*

[e] 6 & 7 Vict. c. 18, s. 90.

## CITIES AND TOWNS.

*(Being Counties of themselves.)*

***Duties before Election.***

The Sheriff, *where he is returning officer*, after indorsing the day of such receipt, and giving a memorandum of having so received it to the postmaster who delivered it to him, must cause public notice to be given of the time and place of election. It must be held, within the space of eight days next after that of receipt of the writ or precept; giving *three* days' notice thereof, at least, exclusive of the day of proclamation and of the day of the election.[a] The notice must be given within the hours prescribed with regard to county elections.[b] Except as regards Coventry,[c] in cities and towns being counties of themselves, there is no legislative provision as to the *place* where the election is to be holden. By the Reform Act (2 & 3 Will. 4, c. 45), the poll was to remain open *two* days; but *one* day only is now allowed.[d] By that stat., 600 might poll at each compartment; whereas now "the polling-booth, or compartment, at each polling place shall be so divided and arranged by the Sheriff, or other returning officer, that not more than 300 electors shall be allotted to poll in each such booth or compartment;" and "on the requisition of any candidate, or of any elector, being the proposer or seconder of any candidate, the booths or compartments of each polling place shall be so divided and arranged by the Sheriff, or other returning officer, that not more than 100 electors shall be allowed to poll in each such booth or compartment: all expense, incident to such an arrangement, to be paid by the person making the requisition. If such a requisition be made, the Sheriff must, *forthwith*, give public notice of the situation of such booths. What has been said with regard to the Sheriff's power to erect booths in county elections, applies with equal force here, except as to the *amount* of expenditure; the expense to be incurred for any booth or booths to be erected for any parish, district, or part of any city or borough, shall not exceed the sum of *25l.* in respect of any one such parish, district, or part.[e] In all other respects, as regards deputies, poll clerks, inspectors, commissioners to administer oaths, register of voters, cheque books, &c., the proceedings previous to an election in cities and towns, being counties of themselves, are the same as for counties.

**Notice of time and place.**

**Time for polling.**

**Numbers to be polled at each booth.**

## CITIES, BOROUGHS, AND TOWNS.

*(Not being Counties of themselves.)*

When the Sheriff of the county has received the writ, indorsed it, and given a receipt for it, as in other cases, he must, forthwith,

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[a] 3 & 4 Vict. c. 81.

[b] *Ante*, p. 55.

[c] 21 Geo. 3, c. 54, s. 14.

[d] 5 & 6 Will. 4, c. 36.

[e] 2 Will. 4, c. 45, ss. 71, 113.

*Duties before Election.*

make out his precept, and, within three days after the receipt of the writ, cause it to be delivered to the proper returning officer, without fee, reward, or gratuity whatsoever.[a]

### *Sheriff's Precept to the Returning Officer.*

Sir *G. M.* Bart. Sheriff of the said county to the returning officer of the borough of *K.* in the said county greeting: Know that I have received a certain writ of our Lady the Queen to me directed the tenor whereof followeth [*the writ verbatim*] and because the execution of the said writ belongs to you therefore by virtue of the said writ I require you that you forthwith cause a burgess to be elected for the said borough in the place of the said —— according to the command of the said writ; when this my warrant shall be executed you shall make known to me immediately after the said election made so that I may certify the same together with the said writ and this precept return to our Lady the Queen in her Chancery forthwith. Hereof fail not. This is your warrant given under the seal of my office. Dated this —— day of —— A.D. ——.

*G. M.* High Sheriff.

This precept, since the statute of 23 Hen. 6, c. 14, is an essential process; and any election had or votes given, without a lawful precept, or before the precept be read and published, are void and of no force.[b] The precept ought to be directed to the returning officer; its validity, however, is not affected by any mistake in its direction.[c] In case of mistake, a second precept may be sent to the returning officer.[d] The Sheriff, if no precept be delivered, or one be delivered to a person who is not the proper officer, is liable to be punished by the House.[e] Where the place of returning officer is vacant, the Sheriff, whose ordinary business it is to direct the precept, must, in person, or by deputy, act as returning officer for the city or borough.[f] He is, *pro hâc vice*, returning officer. There will be a slight alteration in the return in such a case. On the day fixed for the election, the Sheriff opens the proceedings by proclaiming silence and reading the writ. Immediately after reading the writ, *he* must *take and subscribe* the bribery oath, to be administered to him by any justice or justices of the peace of the county, where such election shall be made, or, in his or their absence, by any three electors.

Where there is no returning officer the Sheriff to act.

### *Bribery Oath.*

I *A. B.* do swear that I have not directly or indirectly received any sum or sums of money office place or employment gratuity or reward or any bond bill or note or any promise or gratuity whatsoever either by myself or any other person to my use or benefit or advantage for making any return at the present election of members to serve in parliament and that I will return such person or persons as shall to the best of my judgment appear to have the majority of legal votes.

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[a] *Ante*, p. 54.

[b] See an *historical* account of this precept, 1 Roe on Elect. p. 397, n.

[c] *Dixon* v. *Fisher*, 4 Burr. 2267; 2 Heyw. 47, 126.

[d] 2 Heyw. 65.

[e] Ib. 69. As I do not write for any but the *Sheriff*, I refer all other *returning officers* to Rogers and Roe on Elections; above all, to Mr. Warren's able "Manual of Parl. Election Law," 1852.

[f] 6 & 7 Vict. c. 18, s. 99.

*Duties at County Election.*

Nomination.

He must then read, or cause to be read, openly before the electors there assembled, the *Bribery Act*, and every clause therein contained, under the penalty of 50*l.*[a] The omission, however, to do this does not avoid the election.[b] He then calls upon the electors to name the candidates. If fewer candidates be nominated than the number required by the writ to be returned, the Sheriff, as returning officer, has no authority to open a poll, to allow time for the appearance of another candidate; he is bound, forthwith, to return those nominated. If the number required appear, he must, at once, return them. If more, the election is made by the view, or by the poll.[c]

Election.

Poll.

An election by the view is where it is made with the consent of the freeholders then present, and no poll is demanded for the determination thereof.[d] An election by the poll is where the polls of the electors are numbered. The proper time to *demand* a poll is when the returning officer decides that A. or B. has the show of hands in his favour. The right to demand a poll is necessarily incident to the election.[e] It appears, from the earlier cases, that the Sheriff was not bound to grant a poll, unless a real doubt arose as to the majority of the persons *then present;* but, it being now established that the voters need not be present at the reading of the writ, it necessarily follows, that the number or expression of those present at the reading of the writ is no rule; and that, without regard thereto, the Sheriff must grant a poll when *duly* demanded.[f] If he refuse or neglect to grant the poll, when demanded, the election would be *void*, and the Sheriff, as returning officer, punished.[g] If, however, after such demand, no votes be tendered, within a reasonable time, he may return according to the view. In Westminster (1661), the High Bailiff waited above half an hour, after the appointment of poll clerks, to take the poll, which had been demanded; no votes being tendered, he returned the candidates with the majority on the view, and it was resolved that they were duly elected.[h] When once the poll has been granted, the Sheriff must proceed with it, although the party, who demanded it, should waive it, or disturb the proceedings; otherwise the election will be void.[i] A fresh candidate may be proposed *at any time during the poll,* and his election will be good.

Every candidate must, upon a reasonable request made to him, at the time of such election, or at any time before the day named in the writ of summons for the meeting of Parliament, *by or on behalf of any candidate at such election, or by any two or more registered electors having a right to vote at such election*, make and

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[a] 2 Geo. 2, c. 24, s. 3.

[b] Dougl. 452.

[c] Bristol, 1 Dougl. 245; Montgomery, 15 Journ. 94; 1 Heyw. 376; 1 Peckw. 83.

[d] 7 & 8 Will. 3, c. 25, s. 3.

[e] *Anthony* v. *Seger*, 1 Hag. Ca. Con. Court, 13; *Faulkner* v. *Elger*, 4 B. & C. 449; *Campbell* v. *Maund*, 5 A. & E. 880.

[f] 1 Heyw. 360, 367.

[g] Rogers on Elections, 17; Clerk on Election Com. 75.

[h] 8 Journ. 280; 1 Heyw. 370.

[i] 1 Whitelock, 387; Glan. 133, 141; 4 Inst. 48.

*Duties at County Election.*

subscribe a declaration to the purport or effect following; the request to be *in writing*, and *signed* by the candidate or the said two or more electors (that is to say):—

### *Declaration of Candidate.*

*I* A. B. *do solemnly and sincerely declare that I am to the best of my knowledge and belief duly qualified to be elected as a member of the House of Commons according to the true intent and meaning of the Act passed in the Second Year of the reign of Queen Victoria intituled* "An Act to amend the Laws relating to the Qualification of Members to serve in Parliament" *and that my qualification to be so elected doth arise out of* [here let the party state the nature of his qualification as the case may be; if the same ariseth out of lands, tenements, or hereditaments, let him state the barony or baronies, parish or parishes, township or townships, precinct or precincts, and also county or counties, in which such lands, tenements or hereditaments are situate, and also the estate in the said lands, tenements, or hereditaments, or in the rents or profits thereof, of or to which he is seised or entitled; or, if the same ariseth out of personal estate or effects, let him state of what nature and where situate such personal estate or effects are, and what interest he hath in such personal estate or effects, and upon what securities and in whose names the same are vested] *as hereunder set forth.*

And the election and return of any person, who, upon such request as aforesaid, shall wilfully refuse or neglect to make and subscribe the said declaration, within twenty-four hours after such request shall have been so made, shall be void. This declaration is made before the returning officer at any election, or a commissioner for that purpose lawfully appointed, or any justice of the peace within the United Kingdom of Great Britain and Ireland. The returning officer, commissioner or justice of the peace, before whom the said declaration shall be made, is required to *certify* the making thereof, when the same shall have been made in England or Wales, unto the High Court of Chancery, or to the Court of Q. B. in England, and when the same shall have been made in Ireland unto the High Court of Chancery, or to the Court of Q. B. in Ireland, within three months after the making of the same, under the penalty of 100*l.*

### *Certificate of Declaration.*

I do hereby certify that *C. D.* one of the candidates for the Eastern Division of the county of *C.* being first duly requested in writing in that behalf such request being made and signed by *A. B.* one of the candidates at the said election [*or* "by C. and *D.* being two registered electors having respectively a right to vote at the said election"] did on the —— day of —— 18— before me duly authorised in that behalf make and subscribe a declaration that he to the best of his knowledge and belief was duly qualified to be elected as a member of the House of Commons according to the true intent and meaning of the Act passed in the second year of the reign of Queen Victoria intituled "*An Act to amend the Laws relating to the Qualification of Members to serve in Parliament.*"

Sir *G. M.* Bart. High Sheriff.

Time of polling.

If a poll be demanded, the Court must be adjourned over to the next day but two after the day of nomination; unless such next day but two shall be Sunday, then the adjournment must be to the following Monday.[a] On the adjournment day, the poll is to

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[a] 2 Will. 4, c. 45, s 62.

*Duties at County Election.*

commence at 8, and continue to 5 o'clock.[a] If the proceedings, at the election, be interrupted or obstructed by any riot or open violence, the Sheriff or his deputy cannot *finally* close the poll for such cause. His duty is to adjourn the poll, at the place where the interruption or obstruction takes place, until the following day, and, if necessary, further adjourn the same until such interruption or obstruction shall have ceased, when he must again proceed to take the poll at such place.[b] Whenever the poll is adjourned, in such a case, by the Sheriff's deputy, he must *forthwith* give notice of the adjournment to the Sheriff; and he must not finally declare the state of the poll, or make proclamation of the members chosen, until the poll so adjourned, at such place, shall have been formally closed, and delivered or transmitted to the Sheriff. In case of disturbance *by an individual*, the Sheriff or his deputy should cause him to be taken before a magistrate to be bound over to keep the peace. The Sheriff cannot commit him.[c]

**Interruption by riot, &c.**

**Questions and oaths to a voter.**

At the time of polling in England, Wales, or Berwick-on-Tweed, no question can be put to any voter as to his right to vote, except one or both of the following; and this is to be done by the Sheriff or his deputy only, *if required on behalf of any candidate;* and at the time of his tendering his vote, and not afterwards.[d]

1. Are you the same person whose name appears as *A. B.* on the register of voters now in force for the county of —— [*or* "for the —— riding parts or division of the county of ——" *or* "for the city" *or* "borough of ——" *as the case may be*]?

2. Have you already voted either here or elsewhere at this election for the county of —— [*or* "for the —— riding parts or division of the county of ——" *or* "for the city" *or* "borough of ——" *as the case may be*]?

In addition to these two questions, or either of them, the Sheriff or his deputy, or the Commissioners, must, *if required on behalf of any candidate*, at the time of tendering a vote, administer the following oath or affirmation to the voter:—

### *Oath of Identity.*

You do swear [*or* "affirm" *as the case may be*] that you are the same person whose name appears as *A. B.* on the register of voters now in force for the county of —— [*or* "for the —— riding" *or* "—— division of the county of ——" *or* "for the city" *or* "borough of ——" *as the case may be*] and that you have not before voted either here or elsewhere at the present election for the county of [*or* "for the —— riding" *&c.*] So help you God.

No voter, at any election, is to be required to take any other oath or affirmation, *either in proof of his freehold, residence, age, or other qualification, or right, to vote.*[e] Before the voter be admitted to poll, the officer presiding, if demanded by either of the candidates, or any two of the electors, must administer to him the

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[a] 16 Vict. c. 15.

[b] Ibid.

[c] *Spilsbury* v. *Micklethwaite*, 1 Taunt. Rep. 146.

[d] 6 & 7 Vict. c. 18, s. 81.

[e] Ibid., s. 82.

*Duties at County Election.*

## *Bribery Oath.*[a]

I *A B.* do swear [*or, being one of the people called Quakers,* "I *A. B.* do solemnly affirm"] I have not received or had by myself or any person whatsoever in trust for me or for my use or benefit directly or indirectly any sum or sums of money office place or emolument gift or reward or any promise or security for any money office employment or gift in order to give my vote at this election and that I have not been before polled at this election.

The oaths of allegiance and supremacy must, also, be administered to a voter by the returning officer, if requested by any one of the candidates. The oath of abjuration or its substitute also, if requested by any candidate, or by any person present.[b]

Scrutiny.

No scrutiny can be allowed, by or before the returning officer, with regard to any vote given or tendered at the election,[c] as to the offence of personating voters. When it occurs, the duty of the returning officer or his deputy is well defined.[d] If at the time any person tenders his vote, or after he has voted, and before he leaves the polling booth, any candidate's agent shall declare to the Sheriff, or his deputy presiding therein, that he verily believes and undertakes to prove, that the person, so voting, is not in fact the person in whose name he assumes to vote, or to the like effect, the Sheriff or his said deputy must, immediately after such person shall have voted, by word of mouth, order any constable to take him into custody. He cannot reject a vote, if the two questions be answered in the affirmative, and if the person tendering his vote take the oaths, or make the affirmation, required of him; but there must be written in the poll-book against the vote, the words *protested against for personation.* By rejecting a vote, under such circumstances, he subjects himself to a criminal prosecution.[e] The constable must take him before *two* justices; but, if two justices cannot be procured within three hours after the close of the poll on that day, the constable is required, at the request of the offender, to take him before *one* justice, who is authorised and required to liberate him, on his entering into a recognizance with one sufficient surety, conditioned to appear before any two such justices at a future time. If no justice can be found within four hours, the constable must discharge him. If the charge cannot be inquired into within the time, and he be discharged in consequence, any two justices may, afterwards, inquire into the matter; and, if necessary, issue a warrant for his apprehension. If the justices be

Arrest of offender personating a voter.

Bail.

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[a] *Bribery oath* must be administered by the *returning officer* and not by a commissioner, 2 Geo. 2, c. 24, and 43 Geo. 3, c. 74.

[b] In a respectable and elaborate text-book of law, published in 1852, it is said that the oaths of allegiance, abjuration, and supremacy are no longer to be taken; but the author is clearly in error. The stat. of 5 & 6 Will. 4, c. 36, is expressly confined to *cities, boroughs,* and *towns,* and has no reference whatever to *county* elections. See the oaths, *ante,* p. 2; but, as I have often had occasion to remark, any omission or irregularity in this respect will not avoid the election.

[c] 6 & 7 Vict., c. 18, s. 82; and see *Pryce* v. *Belcher,* 3 C. B. 93.

[d] 6 & 7 Vict. c. 18, s. 86.

[e] *Pryce* v. *Belcher,* 4 C. B. 883; 6 & 7 Vict. c. 18, s. 87.

*Duties at County Election.*

satisfied, that the person charged has been guilty of personation, they are to commit him for trial; otherwise they are to order compensation, which, if he accept, all parties, concerned in his arrest, are relieved from all proceedings in respect thereof. If any other person tender his vote, as being registered for the same qualification (provided he answer the questions), his vote must be entered on the poll-book, but distinguished from the rest.

Custody of poll books.

At the close of the poll, the poll clerks must publicly deliver the books to the presiding officer, who *forthwith* must deliver or transmit them, inclosed and sealed, to the Sheriff, or his Under-sheriff; who is to receive and keep all the poll books, unopened, until the reassembling of the Court *on the next day but one after the close of the poll;* unless such next day but one be *Sunday*, and then on the *Monday.*[a] He then openly breaks the seals, casts up the number of votes, as they appear on the said several books, and openly declares the state of the poll. He then makes proclamation of the member or members chosen. The proclamation must not be later than 2 o'clock in the afternoon of the same day.

Final declaration of poll.

After he has thus declared the state of the poll, and made the proclamation, he must in every county, city, or borough election, in England, Wales, or Berwick-on-Tweed, *forthwith*, inclose and seal up *the several poll books*, and tender the same to each of the candidates, to be sealed by them respectively. In case any candidate neglect or refuse to seal the same, the Sheriff must indorse on one of the books the fact of such neglect or refusal; and, *as soon as possible* after such proclamation as aforesaid, the Sheriff or his agent must deliver the poll books, so sealed, to the Clerk of the Crown, in the High Court of Chancery, or his deputy; or, the Sheriff may deliver them, directed to the Clerk of the Crown, to the postmaster or deputy postmaster of the place where the proclamation was made; who is to give an acknowledgment, in writing, of such receipt, expressing therein the time of such delivery, keeping a duplicate signed by the Sheriff or his deputy. If sent through the Post Office, there must be sent, at the time of transmitting the books, a letter by the same post or mail, to the Clerk of the Crown, informing him of such transmission, and giving him the number and description of the poll books so transmitted.[b] Any person is entitled to a copy of the poll, on payment of a reasonable charge for writing it.[c]

Custody of poll books after election.

## CITIES AND TOWNS.

*(Being Counties of themselves.)*

Booths.

No more than 300 voters can be allotted to poll in each booth; and not more than 100, on the requisition of any candidate, or of

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[a] 16 & 17 Vict. c. 15.

[b] For the Committees of the House of Commons, &c.

[c] 7 & 8 Will. 3, c. 25, s. 6.

*Duties at City and Town Election.*

Poll.

Oaths, &c.

any elector, being the proposer or seconder; the candidate or elector paying all expenses incident upon such arrangement. If so arranged, the Sheriff must *forthwith* give public notice of the situation of the booths. Liverymen of London, entitled to vote in respect of premises in the city, may vote at the booth for the district where their property is.[a] On the day appointed by him, after proclamation for silence, he must read his authority to hold the Court; take and subscribe the *bribery oath;* read or cause to be read openly the *Bribery Act;* and proceed as in county elections. The polling is limited to *one* day.[b] As often observed before, no omission or irregularity as to notices, not reading Bribery Act, closing poll too early, &c., will *avoid* the election, unless the Committee of the H. of Commons be satisfied that the result was affected by it.[c] It is to commence at 8 in the forenoon of the day next following the day fixed for the election, and to close at 4 o'clock. When the next day is a *Sunday, Good Friday*, or *Christmas Day*, then on the following day. The questions to be put to the voters, at the time of polling, are the same as at county elections. The oaths of allegiance, abjuration, and supremacy, can no longer be tendered to a voter; nor any oath or oaths required to be taken by any Act of Parliament in lieu thereof.[d] His duties, in case of riot, &c., are the same as in a county election.[e] In all other respects, as to keeping and sealing the poll books, both at and after the election, &c., the proceedings are the same as at county elections.[f] He should make his return without delay.[g]

### *Indorsement on Writ.*

The execution of this writ appears in the schedule hereunto annexed.

The answer of —— High Sheriff.

### *Return.*[h]

At the present day, the return is made by Indenture under seal, between the High Sheriff and the electors, in conformity with the stat. of 7 Hen. 4, c. 15, and the 8 Hen. 6, c. 7. According to the exigency of the writ of election, the former statute required the Indenture to be under the seals of *all* the electors; but by the latter statute it is made between the High Sheriff of the one part, and a few electors (*three or four*) by name, "*and many other persons of the county aforesaid, and electors of knights to Parliament for the said county, of the other part.*"

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[a] 5 & 6 Will. 4, c. 36.

[b] Ibid., s. 2.

[c] Athlone, Bar. & Arn. 119.

[d] 5 & 6 Will. 4, c. 36, s. 6.

[e] Soldiers are not now removed, but remain in barrack, 10 & 11 Vict. c. 21.

[f] *Ante*, 63.

[g] 11 & 12 Vict. c. 98, s. 103; see also 10 & 11 Will. 3, c. 7, and 6 & 7 Vict. c. 18.

[h] See 1 Peckw. 119, n.

### *Indenture.*

Return.

This indenture made in the full county of —— holden at —— in and for the said county on —— the —— day of —— in the —— year of the reign of our sovereign lady Queen Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen defender of the faith and so forth and in the year of our Lord 18—; *Between A. B.* Esq. High Sheriff of the said county of the one part and *C. D. E. F.* and many other persons of the county aforesaid and electors of knights to parliament for the said county of the other part: Witnesseth that proclamation being made by the said Sheriff by virtue of and according to a writ of our sovereign lady the Queen directed to the said Sheriff and hereunto annexed for the election of two knights of the most fit and discreet of the said county girt with swords to serve in a certain parliament to be holden at the city of Westminster on the —— day of —— next ensuing; the said parties to these presents together with the major part of the electors for the county aforesaid present in the full county of —— at —— aforesaid on the day of the date hereof by virtue of the said writ and according to the force and effect of divers statutes in that case made and provided herein in the said full county of —— by unanimous assent and consent freely and indifferently elected and chose two knights of the most fit and discreet of the said county girt with swords to wit —— to be knights to the said parliament so to be holden at the day and place in that behalf hereinbefore mentioned for the commonalty of the county of ——;[a] giving and granting to the aforesaid knights full and sufficient power for themselves and the commonalty of the same county to do and consent to those things which in the said parliament by the common council of the kingdom of our said lady the Queen (by the blessing of God) shall happen to be ordained upon the affairs in the said writ specified. In witness whereof the parties to these presents have interchangeably put their hands and seals the day year and place first above written.[b]

Stamp.

Mr. Orme says that this return is "*to be engrossed on the usual stamp for deeds.* Mr. Roe, on the other hand, states that it requires *no* stamp. The former seems to be the better opinion. There ought to be a counterpart of the Indenture; for where the original was stolen the counterpart was held sufficient.[c] When the Indenture is executed, it is, by the statute of 7 Hen. 4, c. 15, to be tacked to the writ, and both (the execution of the writ being indorsed) remitted to the Clerk of the Crown in Chancery; into whose department the returns are made.

Transmitted to the Clerk of the Crown in Chancery.

The return to the *precept* (when there is one) is by Indenture between the returning officer and the Sheriff.

### *Return of Precept.*

This indenture made in the liberty of *W.* in the county of *M.* the —— day of —— in the —— year of the reign &c. between —— Sheriff of the county of *M.* aforesaid of the one part and *J. C.* Esq. Bailiff of the liberty of the —— in the county aforesaid of the other part; Witnesseth that by virtue of a certain precept directed from the said Sheriff to the bailiff and sewed to this indenture proclamation of the premises in the said precept first mentioned and of the day and place as in the said precept is directed first being made the citizens who were present at the said proclamation have freely and indifferently according to the form of the statute in that case made and provided and according to the tenor and effect of the aforesaid precept

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[a] If two knights or burgesses be elected at the same time, as at a general election, there is but one instrument.

[b] This is the return of a county member; *citizen* or *burgess* must be substituted, if not a county election.

[c] 23 Journ. 535.

*Return.* and of the writ in the said precept recited chosen one citizen of the most discreet or sufficient of the city and liberty aforesaid that is to say *C. H.* Esq. to which said *C. H.* so elected the aforesaid citizens have given and granted full and sufficient power from themselves and the commonalty of the city [town borough and liberty] aforesaid to do and consent to those things which at the said parliament by the common council of the said kingdom with God's assistance shall happen to be ordained upon the affairs in the said precept specified according to the form and effect of the said precept. In witness whereof as well the said Sheriff as the aforesaid bailiffs of the city [town borough and liberty] aforesaid to these indentures their seals have interchangeably put the day and year first above mentioned.[a]

### *Sheriff's Return.*

The answer of —— Sheriff of the county of *M.* to this writ.

By virtue of this writ to me directed and delivered and by the precept hereunto annexed under my hand and seal of office and directed to the returning officer of the said city I commanded the said returning officer as within I am commanded which said returning officer to wit *G. A.* Esq. in answer to the said writ saith that the execution of the said writ appears in certain indentures hereunto annexed.

By the same Sheriff.

By whom return made. As the precept is directed and delivered to the proper returning officer of the borough, he is the only person who can make a good return to the High Sheriff. If not made by the proper returning officer, the High Sheriff should not execute the Indenture. The return of an officer *de facto* is, however, sufficient, although he may not have complied with all the legal forms necessary to sustain his election to the office upon a *quo warranto.*[b]

Two returns. Where an Under-sheriff executed *two* returns, one made by a person not named in the precept, the other by the proper officer, and returned them both, he was committed to the custody of the Sergeant-at-arms.[c]

*Double return.* There may be an equality of voters; if so, as the returning officer has no casting vote, he must return both.[d] Other cases may likewise arise where a double return is justifiable; but if any officer wilfully, falsely, and maliciously return more persons than are required to be chosen by the writ or precept, an action with double damages may be had against him; and the parties who willingly procure the same, independently of the censure and punishment that he may be subjected to at the bar of the House of Commons.[e] The returning officer has now the power

*A special return.* of adjournment in case of riot; yet circumstances may arise to make *a special return* necessary.[f]

Informal return and amendment. No return can be impeached for want of form.[g] But, if any omission or mistake be made in the return, it must be amended, before the person elected can take his seat, although duly elected;

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[a] In some places, as at Westminster, it is *usual* for some of the electors to join; it is then to be indorsed by the High Sheriff, as in other *sub-returns.*

[b] 2 Heyw. 62; Dougl. Rep. 568.

[c] 2 Peckw. 327.

[d] 1 Peckw. 16, n. (*a*).

[e] 7 & 8 Will. 3, c. 7, s. 3.

[f] 2 Peckw. 383; 38 Journ. 8; 2 Journ. 22; 18 Journ. 21.

[g] Orme, 103.

for a good election is only a ground to amend an undue return; but not to admit the elected without a good return. The House alone, after return once made, has the power to alter or amend it. It is done in this way: on the motion of a member, the House orders the Clerk of the Crown in Chancery to attend with the return, and he then amends it, as the House may direct.

The returning officer, whose conduct has been complained of in a petition, has often been allowed to appear in Committee, as a separate party, by counsel; but as this grew out of an objection to his competency as a witness, and that incompetency having been removed by the Law of Evidence Act (14 & 15 Vict. c. 95), it seems to follow that this would not now be allowed.[a]

*Death of Sheriff.*

If the High Sheriff died, between the issuing the writ and its return, the House, formerly, ordered a new writ to be issued to the new Sheriff.[b] But since the statute of 3 Geo. 1, c. 15, s. 8, his Under-sheriff or deputy must, in such a case, execute all writs, &c., in the name of the deceased Sheriff, until another Sheriff be appointed and sworn.[c]

*Change of.*

If the High Sheriff should go out of office, the writ, if not wholly executed, is transferred to his successor; if wholly executed, it is returned by him into Chancery. There is no difference, as regards the transfer, between this writ and a common fi. fa.

## SECTION V.

### SHERIFF'S COURT UNDER WRIT OF TRIAL.

BEFORE the 3 & 4 Will. 4, c. 42, s. 17, trials were only at bar, or *nisi prius*; but now, "in any action depending in any of the said superior Courts for *any debt or demand in which the sum sought to be recovered and indorsed on the writ of summons shall not exceed 20l.*, it shall be lawful for the Court, in which such suit shall be depending, or any judge of any of the said Courts, if such Court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such Court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried *before the Sheriff of the county, where the action is brought, or any judge of any Court of Record for the recovery of debt in such county*; and, for that purpose, a writ shall issue, directed to such Sheriff, commanding him to try such issue or issues by a jury, to be summoned by him, and to return such writ, with the finding of the jury thereon, indorsed, at a day certain in term or in vacation to be named in such writ; and, thereupon, such Sheriff or judge shall summon a jury, and shall proceed to try such issue or issues. By the 4 & 5 Will. 4, c. 62, s. 20, the same power is given to the Court of Common Pleas of the county palatine of Lancaster; and to that of Durham by the 2 & 3 Vict. c. 11. **Jurisdiction, &c.** The debt or demand, be it observed, must be liquidated—of such a nature as to be indorsable on the writ; if it does not fall within that description, neither the consent of the parties, nor any ingenious moulding of the declaration, particulars of demand, or indorsement, can give jurisdiction.[a] In some cases, a rule seems to have been laid down, and acted upon, viz. that where a cause, not properly triable before the Sheriff, had actually been tried there, the Superior Court would not set it aside, at the instance of the party who obtained, or of the party who consented to the order; but leave him to his writ of error. This rule, however, is not universal even in the same Court.[b] A Court or judge had, it seems, before *The Common Law Procedure Act*, no power to reduce the amount indorsed upon a writ of summons, so as to make the cause triable before the Sheriff.[c] When the defendant obtains an order to try before the Sheriff, the judge has no authority to impose terms on the plaintiff, as to the time of trying, without his consent.[d] It is sometimes made a part of the rule for a new trial, that the cause should be tried before a judge, if it appears to be a case involving difficult points of law.[e] Issue must be joined before making the application for the writ. **When writ issues.** It may be made to the Court, or to a judge at chambers. If made at chambers, and order refused, the Court will not, without special facts, entertain a motion for reviewing his decision.[f] If the plaintiff make default, so as to have justified, under the old practice, a motion for judgment as in case of a nonsuit, he now adopts this course: he gives twenty days notice to the plaintiff to bring on the issue, to be tried before the Sheriff, at the Court to be holden next after the expiration of such twenty days. If plaintiff afterwards neglect to give notice, or proceed to trial pursuant to defendant's notice, the latter enters a suggestion of the default, and signs judgment for his costs. The Court, or a judge, has power to extend the time for proceeding to trial.[g] The writ may be to try issues of fact, and assess damages on issues of law.[h]

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[a] See Rogers on Election Com. 50; Clerk on El. Com. 56.

[b] 11 Journ. 838; Gloucester, 14 Journ. 88.

[c] *Ante*, p. 16.

### *Affidavit to obtain Writ of Trial.*

In the Q. B.

Between { *A. B.* Plaintiff, and *C. D.* Defendant.

*G. A.* of —— gentleman the plaintiff's attorney in this cause maketh oath and saith that this action is brought to recover —— and that the sum sought to be recovered and indorsed on the writ of summons does not exceed *twenty* pounds; and this deponent further saith that issue has been joined herein and that the trial as this deponent verily believes will not involve any difficult question of fact or law.[a]

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[a] See *Jacquet* v. *Bower*, 5 M. & W. 155; *Roffey* v. *Shoobridge*, 9 Dowl. 957; *Lawrence* v. *Wilcock*, 11 Ad. & E. 941; *Jones* v. *Thomas*, 6 Jur. 462; *Lismore* v. *Beadle*, 1 Dowl. N. S. 566; *Collis* v. *Groom*, ib. 496.

[b] *Walker* v. *Needham*, 4 Sc. N. R. 222; *Lismore* v. *Beadle*, 1 Dowl. N. S. 566; *Price* v. *Morgan*, 2 M. & W. 53; *Lawrence* v. *Wilcock*, 11 Ad. & E. 941.

[c] *Trotter* v. *Bass*, 1 Bing. N. C. 516.

[d] *Wright* v. *Skinner*, 4 Dowl. 727.

[e] *Muggeridge* v. *Drew*, 9 Dowl. 1042.

[f] *Davies* v. *Lloyd*, 4 Dowl. 478.

[g] Reg. Gen. Hil. T. 1853, 258.

[h] *Fryer* v. *Smith*, 6 Sc. N. C. 658.

Sworn &c. G. A.

Notice of trial, &c.

The notice of trial or of inquiry seems to be a *ten* days' notice, unless otherwise ordered by the Court or a judge;[b] and *Reg. Gen. Hil. T.* 1853, which annul all existing *written rules of practice*, in any of the three Superior Courts, *in regard to* civil actions, in respect of which the said Courts possess a common jurisdiction, seem to apply to trials before the Sheriff. The rules are:— 34. "Notice of trial or inquiry, and of continuance of trial or inquiry, shall be given in *town*; but countermand of notice of trial or inquiry may be given in *town or country*, unless otherwise ordered by the Court or a judge." 35. "The expression *short notice of trial*, or *short notice of inquiry*, shall, in all cases, to be taken to mean *four days*." 36. "Notice of trial or inquiry may be continued to any sitting in or after term, on giving a notice of continuance *four* days before the time mentioned in the notice of trial or inquiry, unless short notice of trial or inquiry has been given, in which cases *two* days previous notice shall be sufficient, unless otherwise ordered by the Court, or a judge, or by consent." 37. "Countermand of notice of inquiry shall be given *four* days before the day of inquiry mentioned in the notice, unless short notice of inquiry has been given, and then *two* days before such day, unless otherwise ordered by the Court, or a judge, or by consent."

The several writs of *venire*, *distringas*, and *habeas corpus juratorum*, as well as the entry *jurata ponitur in respectu*, are done away with. The Sheriff now *summons* the jurors.[c]

### *Notice where there are Issues in Law and Fact.*

In the Q. B.

Between *A. B.* plff. and *C. D.* deft.

Take notice that the issue [*or* "issues"] in fact joined in this cause between the above parties will be tried on &c. [*as above*] and that the jury who try the said issue [*or* "issues"] will at the same time assess the damages against you in this cause upon the judgment by default [*or* "upon the demurrer in case judgment shall thereupon be given for the plaintiff."]

Yours &c.
To Mr. ——. —— plff's attorney.

### *Oath to Juryman.*

You shall well and truly try the issues joined between the parties and a true verdict give according to the evidence. So help you God.

### *Affirmation of Juryman.*

I —— being one of the people called Quakers do solemnly sincerely and truly declare and affirm that I will well and truly try the issue joined between the parties and a true verdict give according to the evidence.

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[a] Forms of issue, writ, postea, judgment, &c., are given by Reg. Gen. Hil. T. 1853, Sch.

[b] 15 & 16 Vict. c. 73, s. 97.

[c] 15 & 16 Vict. c. 73, ss. 104, 105.

### *Oath to Witness.*

The evidence you shall give to the Court and jury touching the matters in question shall be the truth the whole truth and nothing but the truth. So help you God.

### *Affirmation of Witness.*

I —— being one of the people called Quakers do solemnly sincerely and truly declare and affirm that the evidence which I shall give touching the matters in question shall be the truth the whole truth and nothing but the truth.

Within what time to be executed.

If tried before the *deputy* of an Under-sheriff, it is void.[a] It ought to be fully executed before the time when the writ is made returnable, like any other writ. But where it appeared, by the Sheriff's return, that it was executed the day after the return day, the Superior Court intimated that they would amend the return if necessary. In the case referred to, however, the defendant had appeared, and by that act, perhaps, had waived the objection.[b] In a more recent case, Parke B. seems to have doubted this, and said, "If the trial of the cause has not *commenced* before the writ is returnable, the proper course seems to be to apply to a judge to have the time extended."[c] Where the writ was returnable on July the 27th, and the trial commenced on the 27th, but the verdict was not delivered till the 28th, and an objection was then taken, on behalf of the party to whom the verdict was adverse, that the Under-sheriff had no power to receive and enter the verdict, the Court held that the objection was too late.[d]

Amendment of record.

With respect to amendment, *The Common Law Procedure Act*, 1852 (15 & 16 Vict. c. 76, s. 222), seems not to apply to the *Sheriff*, in this respect. This is deeply to be regretted, for many reasons, more especially as the pleadings transmitted to him by a writ of trial are prepared according to its provisions; and yet the more extended power of amendment, which was thought a necessary element in trials before a judge of one of these Superior Courts, does not exist when the cause comes to be tried before him! There are, then, two statutes, viz. the 9 Geo. 4, c. 15, and the 3 & 4 Will. 4, c. 42: 9 Geo. 4, c. 15, applies to variances between any matter *in writing or in print* produced in evidence and the record; the 3 & 4 Will. 4, to variances between *oral evidence* and the record, in any particular, *not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action or defence.* The words, "merits of the case," here mean the *substantial* merits of the case.[e] Under these powers (and the

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[a] *Jones* v. *Williams*, 2 Dowl. N. C. 938.

[b] *Sherman* v. *Tinsley*, 8 Hodges, 32.

[c] *Mortimer* v. *Preedy*, 3 M. & W. 602.

[d] *Pinkney* v. *Booth*, 1 Dowl. N. S. 421.

[e] *The Pacific S. N. Co.* v. *Lewis*, 16 M. & W. 783; *Harvey* v. *Johnstone*, 6 D. & L. 120.

Sheriff had the same) the Judges of the Superior Courts amended not only when the variance was between the evidence and an allegation that need not be proved, such as the date of a bill of exchange mis-stated; but even when the variance was between the evidence (whether written or parol) and allegations, that must be proved; and that, too, on the very points in issue.[a] The fact of amendment causing a defect which would otherwise render the pleading bad in arrest of judgment was held to be no objection to it.[b] *Omissions* have also been supplied, as another count, additional cause of action, and the like (whether there was anything to amend by or not); but whether the power exists to this extent *in the Sheriff*, seems very questionable.[c] The Amendment must be made during the trial, and before verdict. The Sheriff cannot give the party power to amend on a future day.[d] So, in order to have judgment entered by the Court above "according to the very right and justice of the case," where the facts have been found specially, the application must be made before verdict.[e] When leave is given to move to enter a nonsuit, the plaintiff should, if the circumstances of the case require it, ask to have reserved to the Court above the power of amending the variance.

**When amendment made.**

**Appeal.**

The Superior Court will review the Sheriff's decision as to amending the record. The Sheriff ought to be liberal in allowing amendments, especially under the 3 & 4 Will. 4, c. 42, s. 23, for that section provides a remedy, if an amendment be made which ought not, but gives no remedy, in any case in which the application to amend has been refused.[f] The Court has no power to amend a record, under the above statute, when the jury have been directed to find the facts specially.[g]

**Power to nonsuit, &c.**

The Sheriff has the power of directing a nonsuit.[h] If a plaintiff refuse his consent to a nonsuit, leave to move to enter a nonsuit cannot be granted.[i] He has power to postpone the trial, should he see proper grounds for doing so,[k] but an adjournment, to give the plaintiff time to produce further evidence, to avoid a nonsuit, is improper, and the Court will set aside the proceedings.[l] He has no power to certify under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs;[m] nor has the Court above any such power.[n] Nor has he power to certify

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[a] *Gaylor* v. *Farrant*, 4 Bing. N. C. 286; *Gregory* v. *Duff*, 13 Q. B. 610.

[b] *Harvey* v. *Johnston*, 6. D. & L. 120.

[c] *Ernest* v. *Brown*, 2 M. & R. 13; *Carmarthen, M. of*, v. *Lewis*, 6 C & P. 608; *John* v. *Currie*, ib. 61; *Bye* v. *Bower*, 1 C. & M. 262.

[d] *Brashier* v. *Jackson*, 6 M. & W. 549; *Doe* d. *Bennett* v. *Long*, 9 C. & P. 773; *Serjeant* v. *Chafey*, 2 H. & W. 273. *Semble*, before verdict recorded. *Roberts* v. *Snell*, 1 M. & G. 577.

[e] 2 Har. & W. *suprà*.

[f] *Jenkyns* v. *Phillips*, 9 Car. & P. 766, and see *Sainsbury* v. *Matthews*, 2 Jur. 946, Exch.

[g] *Guest* v. *Elwes*, 2 N. & P. 230.

[h] *Watson* v. *Abbott*, 2 Cr. & M. 150.

[i] *Butler* v. *Goodman*, 2 Jur. 1067, B. C.

[k] *Fawraker* v. *Jackson*, 2 Jur. 329, Exch.

[l] *Wootton* v. *Russell*, 2 Jur. 776, B. C., sed vide *Parkham* v. *Newman*, 1 C. M. & R. 584.

[m] *Wardroper* v. *Richardson*, 1 Ad. & E. 75; *Claridge* v. *Smith*, 4 Dowl. 583.

[n] *Story* v. *Hudson*, 5 Dowl. 558.

**Power to refer.**

under the Tower Hamlets Court of Request Act, that the plaintiff had reasonable and probable cause of action to the amount of *5l.*[a] He has, however, power to certify, under the Middlesex Court of Request Act (23 Geo. 2, c. 33, s. 19) that the freehold, or an act of bankruptcy, was in question.[b] He has no power to refer a cause to arbitration; he is bound to try the cause, and cannot delegate his authority to another.[c] Where a bill of exceptions was tendered, which the Under-sheriff refused to receive, the Court above would not interfere to stay judgment and execution.[d] He is justified in laying down a rule, that no person but a barrister or an attorney, is to appear as the advocate of a party.[e]

**Pleadings and evidence.**

The record comes now before him framed as directed by *The Common Law Procedure Act*, 1852; but as the effect of that Act is, in this respect, only to do away with objections to form, the rules of evidence are not affected by it. For instance, under the pleas *that he never was indebted as alleged,* and *that he did not promise as alleged,* the same evidence, in kind and degree, is given, as before was given under the pleas of *non assumpsit* and *nunquam indebitatus.* The following matters of defence (amongst many others) are therefore receivable under the general plea. That the plaintiff is not *solely* entitled to the money claimed.[f] In an action for use and occupation, the fact of the mortgagee of the premises having given the defendant notice to pay the rent to him is receivable in evidence under it, if the rent sought to be recovered accrued due *after* the notice; but if the rent accrued due *before* the notice, this defence must be specially pleaded.[g] The defence of negligence;[h] or that the work was done under a condition that if it did not suit or succeed, nothing should be paid for it;[i] or, that it was to be done without fee or reward;[k] or that there is no sufficient contract to satisfy the Statute of Frauds, are receivable under the general plea.[l] So where the general plea is pleaded to an action for work done by plaintiff as an apothecary the plaintiff is liable to be nonsuited under the statute of 55 Geo. 3, c. 184, s. 21, if he fail to prove his certificate, or that he was in practice before the 5th day of Aug. 1815,[m] and that too, although the defendant has pleaded the general plea as to part, and as to the residue a tender.[n] Credit not expired;[o] badness of quality;[p] that the article did not answer to the warranty given;[q] that plaintiff had agreed to do the work declared for, on a certain event which had occurred, for a certain sum;[a] are all matters receivable in evidence under the general plea when pleaded to the common indebitatus counts. In a word, any matter which tends to show that no debt payable on request in point of fact ever accrued at all is proper under the general plea. On the other hand, every fact which tends to show that the contract is void or voidable,—all matters, in confession and avoidance, must be specially pleaded; and, if not pleaded, when they ought, they cannot be received in evidence for any purpose; not even in mitigation of damages.[b] Therefore fraud, illegality, rescission of contract, release, payment, and the like, must be specially pleaded. There are three pleas so frequently before the Sheriff as to require more particular notice than others—viz. payment, payment of money into Court, and set-off. With regard to the first of these pleas the rule of Trin. T. 1 Vict. provides that the defendant need not plead payment of any sum given credit for in the particulars of demand. Again, if payment generally be pleaded, *part payment* may be given in evidence under it, *in mitigation of damages*;[c] but if there be no such plea, it cannot.[d]

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[a] *Elsley* v. *Kirby*, 9 M. & W. 536; *Capes* v. *Jones*, 2 C. B. 914.

[b] *Bishop* v. *Marsh*, 6 Bing. N. C. 12; *Forbes* v. *Simmes*, 2 Sc. N. C. 199.

[c] *Wilson* v. *Thorpe*, 6 M. & W. 721; *Harrison* v. *Greenwood*, 3 D & L. 353.

[d] *White* v. *Hislop*, 4 M. & W. 73.

[e] *Tribe* v. *Wingfield*, 2 M. & W. 128.

[f] *Solly* v. *Neish*, 2 C. M. & R. 358.

[g] *Waddilove* v. *Barnett*, 4 Dowl. 347.

[h] *Hill* v. *Allen*, 2 M. & W. 283.

[i] *Grounsell* v. *Lamb*, 1 M. & W. 352; *Hayselden* v. *Staff*, 5 Ad. & E. 153.

[k] *Jones* v. *Nanny*, 5 Dowl. 90.

[l] *Elliott* v. *Thomas*, 3 M & W. 170.

[m] *Shearwood* v. *Hay*, 5 Ad. & El. 383; *Morgan* v. *Ruddock*, 4 Dowl. 311; *Wagstaffe* v. *Sharpe*, 3 M. & W. 521.

[n] Ibid.

[o] *Broomfield* v. *Smith*, 1 M. & W. 542; *Webb* v. *Fairmaner*, 3 M. & W. 473.

[p] *Cousins* v. *Paddon*, 2 C. M. & R. 547.

[q] *Dickens* v. *Neale*, 1 M. & W. 556.

**Plea of payment.**

As regards the payment of money into Court these questions arise—what is the effect of the plea of payment of money into Court as an admission? and what is the consequence of the plaintiff's failing to establish a debt or damage exceeding the amount paid into Court? Its effect seems to be this:—when pleaded to a common indebitatus count, it admits that the defendant owes the plaintiff the sum paid in, upon some contract which may be comprehended in the count. If, therefore, plaintiff says he owes him more upon any contract, such contract must be proved. When pleaded to a count on a *special contract*, the plea admits the contract and the breach. When pleaded to actions of *tort*, the effect of the plea may be subject, according to the form of the declaration, either to the rule applicable to special contracts, or to that which is applicable to indebitatus counts, that is to say, when the declaration is general and unspecific, it admits *a* cause of action, but not *the* cause of action sued for; and the plaintiff must give evidence of the cause of action sued for, before he can have larger damages than the amount paid into Court. On the other hand, if the declaration be specific, so that nothing would be due to the plaintiff from the defendant, unless the defendant admitted the particular claim made by the declaration, it admits the cause of action sued for, and so stated in the declaration.[e] As a corollary from this, it follows, that if the plaintiff does not establish damages *ultra*, a nonsuit or an adverse verdict must be the consequence. It remains to be added, that when the special contract is admitted by the plea, as a bill of exchange, promissory note, or the like—the

**Payment of money into court.**

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[a] *Jones* v. *Reade*, 5 Ad. & E. 529.

[b] *Leicester* v. *Walton*, 2 Camp. 251; *Speck* v. *Phillips*, 5 M. & W. 279; and see *Perkins* v. *Vaughan*, 5 Sc. N. C. 886.

[c] *Lord* v. *Ferrand*, 1 D. & L. 630.

[d] Reg. Gen. 1 Vict., 8 Ad. & E. 280.

[e] *Perren* v. *Monmouthshire R. Co.* 11 C. B. 855, and cases there cited.

Set-off.

writing need not be proved or even produced at the trial; and this is of some importance with a view to the stamp laws. With respect to the plea of set-off: the Sheriff must always keep in mind, that the plea is given by the 2 Geo. 2, c. 22, and is, in its nature, a cross-action, allowed to prevent circuity of action; that debts due in the *same* right can alone be set-off against each other; that the debt due to the defendant must be one due to him at the time of action brought and thence to the time of plea pleaded.[a] If the plaintiff replies *nunquam indebitatus* and the latter prove his plea, the plaintiff cannot be allowed to show that the sum proved, or any part of it, has been paid;[b] but under the replication of *nil debet* he may do so.[c] A plea of set-off is divisible, if, taken together with other pleas, it answers the whole demand; but a plea of set-off to the whole declaration, consisting of several counts, is not divisible; that is to say, when it stands alone, and there are no other pleas to cover the whole demand, and the jury cannot find thereon for the plaintiff on one count, and for the defendant on the other.[d] Where a set-off is pleaded to the whole declaration, but the defendant succeeds in proving a part only, he is entitled to reduce the plaintiff's claim *pro tanto*.[e]

Certificate to stay judgment.

At the return, that is, on the return day of the writ, costs may be taxed, judgment signed, and execution issued *forthwith*;[f] unless the Sheriff or his deputy, or the judge, before whom such trial shall be had, shall *certify*,[g] under his hand, upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the Court above, for a new inquiry, or trial; or a judge of a Superior Court shall think fit to order that judgment or execution shall be stayed till a day to be named in such order.

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[a] *Morrison* v. *Chadwick*, 7 C. B. 284; *Braithwaite* v. *Coleman*, 4 N. & M. 654.

[b] *Brown* v. *Daubeny*, 4 Dowl. 585.

[c] *Jackson* v. *Robinson*, 8 ib. 622; *Stockbridge* v. *Sussams*, 2 G. & D. 591.

[d] *Tuck* v. *Tuck*, 5 M. & W. 109; *Kilner* v. *Bailey*, ib. 382; *Moore* v. *Battin*, 7 Ad. & E. 595.

[e] *Rodgers* v. *Maw*, 4 & L. 66.

[f] *Nichols* v. *Chambers*, 4 Tyr. 836; *Gill* v. *Rushworth*, 2 D. & L. 416; *Alexander* v. *Williams*, 8 Q. B. 981; *Holmes* v. *L. & S. W. R. Co.*, 6 D. & L 686.

As to the proceedings in lieu of judgment as in case of a nonsuit, see *ante*, p.68. After verdict the Court will not entertain an objection which was not made at the trial, as that the jury was wrongly summoned, and was composed of persons who were not on the jury list for the county; *Kington* v. *Groom*, ii. M. & W. 826. Whether there exists under a writ of trial a right of challenge has often been doubted but never decided; *Pryme* v. *Titchmarch*, 10 ib. 605.

[g] If the Sheriff certify or give leave for the purpose, the Court may set aside the verdict and enter a nonsuit; *Ricketts* v. *Barman*, 4 Dowl. 578; but a motion for entering a nonsuit cannot be made unless such leave has been reserved: ibid.; *Beverley* v. *Walter*, 8 Dowl. 418. The Court will not grant a new trial if the verdict be for less than 5*l.*; *Packham* v. *Newman*, 1 C. M. & R. 585; *Lyddon* v. *Combes*, 5 Dowl. 560; *Williams* v. *Evans*, 2 M. & W. 220; *Watts* v. *Judd*, 6 Sc. N. C. 630. The Court will not hear a motion for a new trial unless the Under-sheriff's notes be produced and verified by affidavit entitled in the cause; *Mansfield* v. *Brearey*, 1 A. & E. 347; *Cohen* v. *Williams*, 8 Dowl. 419; and see *Parkhurst* v. *Gordon*, 2 C. B. 894 (n.); or their non-production accounted for by affidavit of the Under-sheriff's refusal to produce them; in the latter case the facts proved at the trial must be sworn to; *Hall* v. *Middleton*, 4 N. & M. 386; *Hellings* v. *Stevens*, 4 Tyr. 270; 2 Dowl.

### *Certificate.*

I hereby certify that judgment ought not to be signed until the —— day of —— A.D. 18— in order that the within named defendant may have an opportunity to apply to the Court for a new trial herein.[a]

*A. B. Sheriff.*

The record being thus remitted to the Superior Court, execution issues as in other cases. The writs, &c., will be found hereafter.

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## SECTION VI.

### SHERIFFS COURT UNDER WRIT OF INQUIRY.

IN this Court the Sheriff acts, at times, in a *judicial*, at times, in a *ministerial* capacity.[b] A writ of inquiry is an inquest of office, to

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252. The Sheriff's notes need not be filed; *Mansfield* v. *Brearey*, *supra.* When an Under-sheriff refused to produce his notes, after the Court had required their production, the Court made him pay the costs consequent on such refusal; *Metcalfe* v. *Parry*, 2 Dowl. 82; but he is not answerable for his agent's conduct in withholding them, unless it is shown that the latter acted under his direction; ibid. In *Flower* v. *Adams*, 2 Dowl. 262, Patteson J. said to counsel on moving for a *rule nisi*, "as you were at the trial I will take a statement of the facts from you without the production of the *Recorder's* notes on applying for the *rule nisi*;" see *Lawlor* v. *Clement*, ibid. 630. The affidavit verifying the Under-sheriff's notes need only state that the paper annexed contains the notes sent by the Under-sheriff to the Court; *Hollings* v. *Stevens*, 4 Tyr. 1001. Affidavits are admissible on the other side of evidence given at the trial which does not appear in the notes; *Lilley* v. *Johnson*, 2 M. & W. 252; *Mangell* v. *Cowley*, 2 Sc. N. R. 523; but when a rule for a new trial is moved for on the Under-sheriff's notes on the ground of the absence of evidence to warrant the verdict of the jury, it is not competent for the other party to use affidavits; *Jones* v. *Howell*, 4 Dowl. 176; the Court will not compel the Under-sheriff to make an affidavit of circumstances which occurred at the trial; *Power* v. *Horton*, 8 Hodg. 14. Where a new trial is moved for as *against evidence* it is not necessary there should be an affidavit stating the ground of motion; *Heming* v. *Ackerman*, 2 D. & L. 732. The circumstance of the Under-sheriff having refused to certify does not preclude a party from applying for a new trial within the proper time, and on such application the Court will judicially notice the record; *Angell* v. *Iler*, 5 M. & W. 660; 7 Dowl. 842. So without a certificate to stay proceedings defendant may after execution apply to enter a suggestion to deprive the plaintiff of costs; *Johnson* v. *Veal*, 5 M. & W. 276; *Bailey* v. *Oliver*, 7 Dowl. 487. The Under-sheriff should state in what way he left the case to the jury; *Ralph* v. *Harvey*, 1 Q. B. 848. The Court will not permit the judgment to be entered without costs; 2 Sc. N. C. 444.

[a] The forms of *postea* and *judgment* are to be found in Reg. Gen. Hil. T. 1853, Sch.

[b] See *Carrett* v. *Smallpage*, 9 East, 333.

When necessary.

inform the conscience of the Court. The Court itself may assess the damages.[a] After judgment by default, or on demurrer, or nul tiel record, where the judgment was *interlocutory*, which was always the case in assumpsit, covenant, case, trespass, and replevin (in debt and ejectment being *final*) the amount of damages was, before *The Common Law Procedure Act*, 1852, ascertained by a writ of inquiry; but that Act, after abolishing rules to compute, makes every judgment of default *final*, in actions brought to recover *a debt or liquidated demand in money*,[b] and enacts that "in actions in which it shall appear to the Court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry;" but that it may be referred to one of the masters. In actions, therefore, other than for *a debt or liquidated demand in money*, the mode of proceeding is just as it was before the Act; that is to say, the judgment is *interlocutory*, and the damages are adjudged by the Court itself, or by a writ of inquiry. In actions of the kind described in the Act, the plaintiff, after signing *final* judgment, may issue a writ of inquiry, or he may apply to the Court, or to a judge, to refer the amount to one of the masters.

### *Writ of Inquiry.*

Victoria, &c. To the Sheriff of *W.* greeting: Whereas *A. B.* lately in our Court before us [*C. P.* "before our justices" *or in Exch.* "before our barons of our Exchequer"] at Westminster, by his attorney sued *C. D.* for [as in declaration]. And such proceedings were thereupon had in our said Court that the said *A. B.* ought to [*do*][c] recover against the said *C. D.* his claims on occasion of the premises. But because it is unknown to our said Court what claims the said *A. B.* hath by means of the premises aforesaid; therefore we command you that by the oath of twelve good and lawful men of your bailiwick you inquire what claim the said *A. B.* hath as well by means of the premises aforesaid as for his costs and charges by him about his suit in this behalf expended and that you send to us [*C. P.* "to our justices" *or* "to our barons"] at W. &c. on the inquisition which you shall thereupon take under your seal and the seals of those by whose oath you shall take that inquisition together with this writ. Witness &c.[d]

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[a] *Bruce* v. *Rawlins*, 3 Wils. 61; *Goodwin* v. *Wilsher*, Yell. 151; 1 Roll. Abr. Damages, L. P. 573; *Gould* v. *Hammersley*, 4 Taunt. 148; *Bridport* v. *Jones*, 3 M. & Gr. 637 n. (*a*); and see *Holdiss* v. *Otway*, 2 Saund. 107, n. 2; and *Price* v. *Green*, 16 M. & W. 350.

[b] 15 & 16 Vict. c. 78, ss. 92, 93, 94.

[c] Where the judgment is final.

[d] The writ is engrossed on parchment, sealed and signed (except in Q. B. Tidd, 9th edit. 574), the day on which it is to be executed should be indorsed upon it, and if left at the Sheriff's office, (which should be the day before at latest), the Sheriff will summon a jury accordingly. It is *tested* on the day on which it issued, in actions within the Uniformity of Process Act, and made *returnable* on any day certain in term or vacation (1 Will. 4, c. 7, s. 1). It is so returnable when issued out of the Court of C. P. at Durham, 2 & 3 Vict. c. 11, s. 17. A Court of Error may now award it, 15 & 16 Vict. c. 76, s. 157. When issued under s. 208, after same act it is tested on the day it issues, and is made returnable immediately after the execution thereof. As to the time of giving notice of inquiry, &c., *short notice*, *continuance*, &c., see *ante*, p. 69, and 15 & 16 Vict. c. 78, s. 97, Reg. Gen. Hil. T. 1853. The Court has allowed the notice to be served at the last place of abode of the defendant, and by putting it up in the master's office; *Probum* v. *Locock*, 1

Reg. Gen. Hil. T. 1853, r. 46, says, "There shall be no *rule* for the Sheriff to return a good jury upon a writ of inquiry, but an *order* shall be made by a judge upon *summons* for that purpose."

Before whom executed.

It is usually executed before the Sheriff or his deputy. Where, however, some difficult point of law is likely to arise, or where the facts are important, it may, by leave of the Court, or a judge, be executed before a judge, at sittings or *Nisi Prius*. He there acts *ministerially* in aid of the Sheriff. If the *venue* be laid in Middlesex or London, it may be executed before the Ch. Justice, or Ch. Baron.[a]

It is usually executed where the *venue* is laid; but under special circumstances, it might be executed elsewhere. Also, in *local* actions, the writ may be executed (by order of the Court in which such action shall be depending, or any judge of any of the superior Courts of law at Westminster,) in any other county, or place, than that in which the venue is laid;[b] and the Court may order a suggestion to be entered on the record to that effect. It may be executed the same day that it is made returnable.[c]

When, where, and how executed.

To execute this writ, he *must*, at once, enter all liberties or franchises.[d] The Court will not stay the execution of this writ, at the instance of any person, unless such person be a party to the suit: for instance, on the motion of the Sheriff; although he could show that, in executing it, his personal liberty was in danger, from the warrant of the Speaker of the House of Commons, or the like.[e] The number of the jurymen may exceed twelve. Where a writ of the kind was executed at the bar of the Court of K. B. in an action of *Scand. Mag.* brought by the *Duke of York* (afterwards James II.) against *Titus Oates*, *fifteen* were sworn upon the jury, and gave all the damages laid in the declaration, viz. 100,000*l.* In that case, the Sheriff of Middlesex sat in Court *covered*, at the table below the judges.[f]

It was, before *The Common Law Procedure Act*, 1853, the universal practice, whenever the damages were *mere matters of calculation*, to have them assessed by one of the masters, without any writ of inquiry at all; thus, in actions on bills of exchange and promissory notes;[g] in covenant for non-payment of rent;[h] of money lent on mortgage;[i] or in an action on an award;[k] or the like. But the rule was in practice confined to those cases where it appeared on the declaration that the action was brought on the instruments themselves.[l] Where the damages were not mere matters of calculation, the Court would not so refer it; and a writ of inquiry was necessary. Thus on a covenant to

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Dowl. N. C. 179; or, when his residence is unknown, by leave of the Court or a judge it may be stuck up in the office.

[a] See 1 Sellon, 344. See also *Green* v. *Price*, 13 M. & W. 700; 16 ib. 350.

[b] 3 & 4 Will. 4, c. 42, s. 22.

[c] *Gawen* v. *Ludlow*, Cro. Eliz. 1040.

[d] Hob. 83; *ante*, 28.

[e] *Stockdale* v. *Hansard*, 9 Ad. & E. 1.

[f] 3 State Trials, 987.

[g] *Shepherd* v. *Charter*, 4 T. R. 275; *Napier* v. *Schneider*, 12 East, 420; *Holdip* v. *Otway*, 2 Saund. 107; *Nelson* v. *Sherridan*, 8 T. R. 395.

[h] *Byron* v. *Johnson*, 8 T. R. 410.

[i] *Berther* v. *Street*, 8 T. R. 326.

[k] See Tidd, 571.

[l] *Osborne* v. *Noad*, 8 T. R. 648.

indemnify;[a] on a foreign judgment;[b] and on a bill of exchange payable in foreign money;[c] and even in assumpsit for a liquidated sum due upon an agreement;[d] the Court would not refer it. So, too, where the damages were not nominal, in *debt* (when the judgment was *final*) as well as in any other form of action, a writ of inquiry was issued; thus, in an action of *debt* for foreign money, a jury found the value of the money; so in use and occupation, on a *quantum meruit*.[e] What alteration has been made by *The Common Law Procedure Act*, 1853, has been fully explained in a former page.

Where there is judgment by default as to part, and issue joined as to the residue; or, when one of several defendants suffers judgment by default, and the other pleads to issue; or, if there be a demurrer to one count, and an issue of fact raised on the other, a writ of inquiry is not issued; the damages, in such cases, are assessed by the jury, who try the issues, by virtue of the precept issued by the judges of assize.[f] But, if plaintiff have obtained judgment on the demurrer, he may execute a writ of inquiry, as to that count, and enter a *nolle prosequi* as to the other: provided he do so before final judgment.[g] Where there is a demurrer as to part, and judgment by default as to the residue, plaintiff may either await the result of the demurrer, and then execute a writ of inquiry on both judgments, or, execute a writ of inquiry at once on the judgment by default, and assess contingent damages on the demurrer.[h] The writ must be executed against *all* the defendants who have suffered judgment by default jointly and not separately. If a several final judgment be entered up, in such a case it will be error.[i] In actions *ex contractu*, where one suffers judgment by default, and the other pleads, and obtains a verdict, no writ of inquiry can issue against the one who has suffered judgment by default; for it appears, by the verdict, that he had no cause of action against either. In actions *ex delicto* it is otherwise; for one may be guilty and the other not guilty.

Demurrer to part and judgment by default to residue.

Where one suffers judgment by default and another pleads and has a verdict.

What evidence is the Sheriff to admit on the inquest? In order to form a correct notion of this, he must know what *admissions are made on the record by a judgment by default.* In a former page has been stated the effect of a plea of payment of money into Court, as an admission of record. The effect of an admission made by such a plea, and of a judgment by default, seem strictly analogous; and the authorities may be mutually brought in aid. Upon the *common indebitatus counts* the effect of such a judgment is, that the cause of action, as alleged in the declaration, is thereby admitted; and the only disputable point is the amount: thus, on a declaration for

Evidence.

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[a] *Dennison* v. *Mair*, 14 East, 622.

[b] *Messin* v. *Massanere*, 4 T. R. 493.

[c] *Maunsell* v. *Massarene*, 5 T. R. 87.

[d] Tidd, 571.

[e] *Arden* v. *Connell*, 5 B. & A. 885; *Bale* v. *Hodgett*, 7 Moore, 602.

[f] 11 Co. 5; *Dicker* v. *Adams*, 2 B. & P. 63.

[g] *Duperoy* v. *Johnson*, 7 T. R. 473.

[h] See 2 Chit. Archb. 697, 756, 6th edit.

[i] *Mitchell* v. *Milbank*, 8 T. R. 199; see also 1 Str. Rep. 422.

**Ex contractu.**

**Ex delicto.**

work and labour, the judgment by default admits the fact of *some* work and labour having been done for the plaintiff, and therefore that something is due; but defendant (the amount only being in dispute) may cross-examine plaintiff's witnesses as to whether certain portions of the work had been done on the retainer of the defendant; and seemingly put any questions which tend to reduce the amount.[a] But, he will not be allowed to give evidence of fraud, or of any other matter, which would render a contract void; because the validity of the contract is admitted.[b] Nor will he be allowed to give in evidence, to reduce the amount, any matter which might have been the subject-matter of set-off;[c] or any fact which would be a bar to the action, if pleaded.[d] Upon *a special count*, the judgment by default admits the contract as alleged; and the amount alone can be inquired into. Thus if the action be brought on a bill of exchange, or promissory note, and defendant let judgment go by default, it need neither be proved nor produced. Formerly it was considered necessary to produce the instrument, to satisfy the jury, that nothing had been paid on account of it; and, if not produced, the jury were directed to find nominal damages only. But, this has been altered; and the law now is, as already stated, that the instrument need not be produced,[e] except for the purpose of recovering interest.[f] If, however, the sum be laid under a *videlicet*, as the judgment by default would not admit that exact sum to be due, the instrument must be produced; and if it require a stamp, properly stamped.[g] In actions *ex delicto*, or, where the damage actually sustained by the plaintiff is the measure of the damages to be given by the jury, if the plaintiff do not prove the nature of the injury, and the amount of the damage sustained by him, the jury should give *nominal* damages only. But where the jury are to infer the amount of the damages from the nature of the injury, the jury may give more than the nominal damages, without any evidence of the damage being given: thus, in an action for words imputing subornation of perjury to the plaintiff, at the execution of the writ of inquiry, the counsel for the plaintiff offered no evidence, but merely addressed the jury, who gave 50*l.* damages; and the Court held that they had not estimated damages erroneously.[h] *In replevin:* if the goods have not been delivered on the replevin, damages are recoverable as well for the value of the goods as for their detention: if the goods were delivered, which, in general, is the case, damages for the detention only are recoverable—usually four guineas—the supposed price of the replevin bond. But the avowant, or person making cognizance, may also have a writ of inquiry, to ascertain the arrears of rent, the value of the goods distrained, and so forth. By 7 Hen. 8, c. 4, s. 3, "avowants and persons making cognizance for rents, customs, and services, if their avowries or cognizances be found for them or the plaintiff be otherwise barred, are to recover damages and costs as the plaintiff would have done if he had recovered. The 21 Hen. 8, c. 19, s. 8, extends this to avowries and cognizances, to distress damage feasant or other rent or rents upon any distress taken in the lands or tenements.[a] By 17 Car. 2, c. 7, s. 2, "whensoever any plaintiff in replevin shall be nonsuit before issue joined, in any suit of replevin by plaint or writ lawfully returned, removed, or depending in any of the king's Courts at Westminster, that the defendant making a suggestion in nature of an avowry or cognizance for such rent, to ascertain the Court of the cause of distress, the Court upon his prayer shall award a writ to the Sheriff of the county where the distress was taken, to inquire by the oaths of twelve good and lawful men of his bailiwick, touching the sum in arrear at the time of such distress taken and the value of the goods or cattle distrained: and thereupon notice of fifteen days shall be given to the plaintiff or his attorney in Court, of the sitting of such inquiry; and thereupon the Sheriff shall inquire of the truth of the matters contained in such writ, by the oaths of twelve good and lawful men of his county: and upon the return of such inquisition, the defendant shall have judgment to recover against the plaintiff the arrearages of such rent, in case the goods or cattle distrained shall amount unto that value: and in case they shall not amount to that value, then so much as the value of the said goods and cattle so distrained shall amount unto, together with his full costs of suit: and shall have execution thereupon by *fieri facias* or *elegit*, or otherwise as the law shall require. And in case such plaintiff shall be nonsuit after cognizance or avowry made, and issue joined, or if the verdict shall be given against such plaintiff; then the jurors that are impanelled or returned to inquire of such issue, shall at the prayer of the defendant inquire concerning the sum of the arrears, and the value of the goods or cattle distrained; and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, together with his full costs, and shall have execution for the same by *fieri facias* or *elegit*, or otherwise, as the law shall require." By s. 3, "if judgment in any of the Courts aforesaid be given upon demurrer for the avowant, or him that maketh cognizance for any rent, the Court shall at the prayer of the defendant award a writ to inquire of the value of such distress; and upon the return thereof judgment shall be given for the avowant, or him that makes cognizance as aforesaid, for the arrears alleged to be behind in such avowry or cognizance, if the goods or cattle so distrained shall amount to that value; and in

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[a] *Williams* v. *Cooper*, 3 Dowl. 204.

[b] *Eadon* v. *Lutman*, 1 Str. Rep. 612.

[c] *Carruthers* v. *Graham*, 14 East, 78.

[d] *Leicester* v. *Walton*, 2 Camp. 251; *Speck* v. *Phillips*, 5 M. & W. 279; *ante*, 151.

[e] *Lane* v. *Mullins*, 2 Q. B. 254; *Lawrence* v. *Clark*, 3 D. & L. 87; *Davis* v. *Barker*, 3 C. B. 606.

[f] *Hutton* v. *Ward*, 15 Q. B. 26.

[g] *King* v. *Beck*, 3 Dowl. 735; *Cooper* v. *Blick*, 2 Q. B. 924; *Banbury* v. *Robinson*, 1 D. & M. 96.

[h] *Tripp* v. *Thomas*, 5 Dowl. & Ry. 276; *S. C.* 3 B. & C. 427.

In replevin.

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[a] See *Gammon* v. *Jones*, 4 T. R. 509.

case they shall not amount to that value, then for so much as the said goods or cattle so distrained amount unto, together with his full costs of suit, and shall have like execution as aforesaid." Where there was a nonsuit, and a *retorno habendo* awarded, it was held that the avowant might execute a writ of inquiry after a writ of second deliverance.[a] *The Common Law Procedure Act*, 1853, s. 208, provides (*in ejectment*) that if a judgment be *affirmed* in error, or the proceeding in error be *discontinued*, the claimant may, on application, have this writ to inquire as well of the *mesne profits* as of the damage by any *waste* committed after the first judgment in ejectment. Ejectments.

Whether a writ of inquiry can issue, after an imperfect verdict, seems very doubtful. In *Dewell* v. *Marshall* the writ was granted, after a defective verdict, in replevin of a distress for a poor's rate.[b] In *Sharpe* v. *Culpepper* the jury, not having ascertained the value of the arrears of rent, it was held that the omission could not be supplied by a writ of inquiry.[c]

### *Return.*

The execution of this writ appears in the inquisition hereunto annexed.

The answer of —— High Sheriff.[d]

W—— to wit. An inquisition indented taken at —— on —— before —— [e] Sheriff of the county aforesaid by virtue of a writ of our Lady the Queen to the said Sheriff directed and to this inquisition annexed to inquire of certain matters in the said writ specified by the oaths of *A. B. C.* [*names of the jurors*] honest and lawful men of the said county who being chosen tried and sworn upon their oath say that *A. B.* in the said writ named hath sustained damages to the amount of £—— besides his costs and charges by him about his suit in that behalf expended and for those costs and charges to 40*s.*[f] [*or* "that the arrears of rent due from the said *C. D.* to the said *A. B.* on the —— day of —— that is to say at the time of such distress taken amounted to the sum of £—— and the jurors aforesaid upon their oath aforesaid further say that at the time of the distress taken the value of the cattle distrained was £——."[g] In witness whereof as well I the said Sheriff as the said jurors have set our hands and seals to this inquisition the day and year above written."

## SECTION VII.

## COMPENSATION COURT.

A COMPENSATION Court is a court wherein the Sheriff, personally, or by deputy, presides, to assess compensation to a person whose Nature of court.

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[a] *Cooper* v. *Sherbrooke*, 2 Wils. 116.

[b] 2 W. Bl. 921.

[c] 1 Lev. 255; see also *Freeman* v. *Archer*, 2 Wm. Bl. 763; *Phillips* v. *Jones*, 15 Q. B. 868.

[d] All returns ought to be made in the name of the High Sheriff; Plowd. 63; *Stroud* v. *Watts*, 3 D. & L. 802.

[e] Ibid.

[f] The plaintiff or avowant may recover damages and costs.

[g] *Ante*, p. 80, in *detinue* the value of the goods; *Pawley* v. *Holly*, 2 Wm. Bl. 853; Cheyney's Ca. 10 Rep. 119; *Sandford* v. *Alcock*, 10 M. & W. 690; *Phillips* v. *Jones*, 15 Q. B. 868; *Williams* v. *Archer*, 5 C. B. 318.

property is to be taken from him, or to be injuriously affected, by some public company, under the powers of some act of Parliament. This Court and its machinery are unknown to the common law. To the language of the legislature, therefore, we must always look for instruction, whether the question be one of form, or substance, the rights of the parties, the nature of the compulsory power, or the jurisdiction and duties of the Sheriff. In the year 1845, it was found expedient to comprise, in *General Acts*, sundry provisions relating to the construction, constitution, and management, of the acquisition of lands, required for undertakings or works of a public nature, and the compensation to be made for the same; as well for the purpose of avoiding the necessity of repeating such provisions in *each* of the several acts relating to such undertakings, as for ensuring greater uniformity in the provisions themselves. The *general* acts are "The Companies Clauses Consolidation Act, 1845," (8 & 9 Vict. c. 16), "The Lands Clauses Consolidation Act, 1845," (8 & 9 Vict. c. 18), and "The Railways Clauses Consolidation Act, 1845," ( 8 & 9 Vict. c. 20), *each of which* (save so far as it may be expressly varied or excepted by any particular act), *is to be incorporated with such particular act, form part of such particular act, and be construed together therewith, as forming one act.*

General Acts.

In a question of disputed compensation, the promoters of the undertaking must, first of all, give a *ten* days' notice to the other party of their intention to cause a jury to be summoned for settling the amount.[a] That done, they are then to issue their warrant to the Sheriff, requiring him to summon a jury for that purpose;[b] or, "*if the Sheriff be interested* in the matter in dispute, application is to be made to some *coroner* of the county, in which the lands in question, or some part thereof, shall be situate; and, if all the coroners of such county be so interested, application may be made to some person having filled the office of Sheriff, or coroner in such county, and who shall be then living there, and who shall not be interested in the matter in dispute; and with respect to the persons last mentioned, preference shall be given to one who shall have most recently served either of the said offices; and every ex-sheriff, coroner, or ex-coroner, shall have power, if he think fit, to appoint a deputy or assessor." But as this direction, in respect of the interest of the Sheriff, is introduced for the protection of the party against whom the interest might operate, such person may waive it.[c]

Company's warrant to Sheriff to summon jury.

Jury.

Upon the receipt of the warrant, the Sheriff summons a jury of 24 indifferent persons, duly qualified to act as common jurymen in the superior courts, to meet, *at a convenient time and place*, to be appointed by him, for that purpose; such time not being less than 14, nor more than 21 days, after the receipt of such warrant; and *such place not being more than* 8 *miles*

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[a] 8 & 9 Vict. c. 18, 38.
[b] Ibid., s. 39.
[c] Ex parte *Baddeley*, 5 D. & L. 577.

*distant from the lands in question*, unless by consent of the parties interested; and he shall *forthwith* give notice to the promoters of the works of the time and place so appointed by him.[a] Out of the jurors appearing upon such summons, *a jury of* 12 *persons shall be drawn by the Sheriff*, in such manner as juries for trials of issues joined in the superior courts are by law required to be drawn; and, if a sufficient number of jurymen do not appear, in obedience to such summons, the Sheriff shall return other indifferent men, duly qualified as aforesaid, of the *bystanders*, or others that can speedily be procured, to make up the jury to the number aforesaid; and all parties concerned may have their lawful challenges against any of the jurymen, but no such party shall challenge the array.[b]

How inquiry conducted.

The Sheriff shall preside on the said inquiry; and the party claiming compensation shall be deemed the *plaintiff*, and shall have all such rights and privileges as the plaintiff is entitled to in the trial of actions at law;[c] and, if either party so request in writing, the Sheriff shall summon before him any person considered necessary to be examined as a witness touching the matters in question; and, on the like request, the Sheriff shall order the jury, or any six or more of them, to *view* the place or matter in controversy, in like manner as views may be had in his trial of actions in the superior courts.[d]

View.

Sheriff or juryman making default.

*If the Sheriff make default* in any of the matters to be done by him, in relation to any such trial or inquiry, *he shall forfeit fifty pounds* for every such offence, and such penalty shall be recoverable by the promoters of the undertaking by action in any of the superior courts. And, *if any person summoned* and returned upon any jury under this or the special act, whether common or special, *do not appear*, or, if appearing, he refuse to make oath, or, in any other manner, unlawfully neglect his duty, he shall, *unless he show reasonable excuse to the satisfaction of the Sheriff, forfeit a sum not exceeding ten pounds;* and every such penalty payable by a Sheriff or juryman shall be applied in satisfaction of the costs of the inquiry, so far as the same will extend; and, in addition to the penalty hereby imposed, every such juryman shall be subject to the same regulations, pains, and penalties, as if such jury had been returned for the trial of an issue joined in any of the superior courts.[e]

Claimant not appearing.

"If the party claiming compensation shall not appear at the time appointed for the inquiry, such inquiry shall not be further proceeded in, but the compensation to be paid shall be such as shall be ascertained by a surveyor appointed by two justices.

Juror's oath.

Before the jury proceed to inquire of and assess the compensation or damage in respect of which their verdict is to be given, *they shall make oath that they will truly and faithfully inquire of and assess such compensation or damage*, and the Sheriff shall administer such oath as well as the oaths of all persons called upon to give evidence.[a] "Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, *the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein* belonging to the party with whom the question of disputed compensation shall have arisen, or which, under the provisions herein contained, he is enabled to sell or convey, *and for the sum of money to be paid by way of compensation* for the damage, if any, to be sustained by the owner of the lands, by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special act, or any act incorporated therewith."[b] And "The Sheriff, before whom such inquiry shall be held, shall give *judgment for the purchase money, or compensation assessed by such jury;* and the verdict and judgment shall be signed by the Sheriff; and, being so signed, shall be kept by the clerk of the peace among the records of the general or Quarter Sessions of the county, in which the lands or any part thereof shall be situate, in respect of which such purchase money or compensation shall have been awarded; *and such verdicts and judgments shall be deemed records.*[c] "On every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the *costs of such inquiry* shall be borne by the promoters of the undertaking; but if the verdict of the jury be given for the same, or a less sum, than the sum previously offered by the promoters of the undertaking; or, if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one half of the costs of summoning, impanelling, and returning the jury, and of taking the inquiry, and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owners of the lands, and the other half by the promoters of the undertaking, and each party shall bear his own costs, other than as aforesaid, incident to such inquiry."[d] *If either party desire* any such question of disputed compensation as aforesaid to be tried before *a special jury,* such question shall be so tried, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have issued their warrant to the Sheriff; and for that purpose the promoters of the undertaking shall *by their warrant to the Sheriff require him to nominate a special jury for such trial;* and thereupon the Sheriff shall, as soon as conveniently may be after the receipt by him of such

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[a] Sect. 41.

[b] Sect. 42.

[c] *The King* v. *Gardner*, 6 Ad. & E. 117.

[d] Sect. 43.

[e] Sect. 44.

Damages how assessed.

The Sheriff to give judgment.

Costs.

Special jury.

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[a] Sect. 48.

[b] Sect. 49.

[c] Sect. 50.

[d] Sect. 51, see *Richardson* v. *The South Eastern Railway Company;* 11 C. B. 169, as to costs under s. 68. In Error, 21 L. J. C. P. 122.

warrant, summon both the parties to appear before him, by themselves or their attornies, at some convenient time and place appointed by him for the purpose of nominating a special jury (not being less than five nor more than eight days from the service of such summons); and at the place and time so appointed the Sheriff shall proceed to nominate and strike a special jury, in the manner in which such juries shall be required by the laws for the time being in force to be nominated or struck by the proper officers of the Superior Courts, and the Sheriff shall appoint a day, not later than the eighth day after striking of such jury, for the parties or their agents to appear before him to reduce the number of such jury, and thereof shall give four days notice to the parties; and on the day so appointed the Sheriff shall proceed to reduce the said special jury to the number of twenty, in the manner used and accustomed by the proper officers of the Superior Courts." *The special jury, on such inquiry, shall consist of twelve of the said twenty, who shall first appear on the names being called over*, the parties having their lawful challenges against any of the said jurymen; *and if a full jury do not appear*, or if after such challenges a full jury do not remain, then, upon the application of either party, the Sheriff shall add to the list of such jury the names of any other disinterested persons qualified to act as special or common jurymen, who shall not have been previously struck off the aforesaid list, and who may then be attending the Court, or can speedily be procured, so as to complete such jury, all parties having their lawful challenges against such persons; and the Sheriff shall proceed to the trial and adjudication of the matters in question by such jury, and such trial shall be attended in all respects with the like incidents and consequences, and the like penalties shall be applicable, as hereinbefore provided in the case of a trial by common jury.[a] Any other inquiry, than that for the trial of which such special jury may have been struck and reduced as aforesaid, may be tried by such jury, provided the parties thereto respectively shall give their *consent* to such trial. *No juryman* shall, without his consent, be summoned or required to attend any such proceeding as aforesaid *more than once in any year.*

The Sheriff may be compelled by *mandamus* to impanel a jury, &c.[b]

**Who entitled to compensation.**

With regard to the persons entitled to compensation, it may be laid down, as a general rule, that any one who has any *beneficial interest* in the land to be so purchased or taken, is entitled to compensation. The Lands Clauses Consolidation Act throughout uses the words *parties interested* in such lands, or parties enabled to sell and convey or release the same.[c] In a subsequent clause of the same Act, a tenant at will is alluded to; but this refers to the preceding clause, which speaks of a tenancy for a year, or from year to year, and not of a tenancy at will. Whether a tenant at will can claim compensation or not has not been determined; but, if he can show a beneficial interest, why should he be excluded? the difficulty seems one of evidence only. There are (as it is said) interests, for which compensation, unless expressly provided for, cannot be assessed; such as the goodwill of a business, tenant's fixtures, improvements, the chance of a beneficial renewal of a lease, and the like.[a] In the case, in which these matters came under the consideration of the Court, tenant's fixtures and improvements were excluded, because the tenant there had not any *legal interest* in them. The chance of a beneficial renewal of a lease, unless expressly provided for, would fall under the same category.[b] But, if there be a covenant for renewal, without any express provision in the special Act itself, is the tenant not to be compensated for his loss? Again, the goodwill of a business has, over and over again, been recognised as an existing and valuable interest.[c] Is the proprietor of this to receive no compensation for his loss? Goodwill, where the profits of the business result entirely from *personal* skill of the party employed, as in the case of a surgeon, or an attorney, may not be recognisable as valuable interests; but such a goodwill as attaches upon property rather than upon individual skill, as in the case of a public house, grocer's shop, and the like, has often been recognised as a valuable interest at law and in equity. Again, if the injury be the necessary consequence of the public works, and one more or less affecting the whole neighbouring property, as if it be caused by the stoppage of public thoroughfares, and so cause to a shop or public house a diminution in business, the proprietor of such a shop or public house may not be entitled to compensation; for, independently of considerations of public policy, such an injury seems too remote for calculation; such a case differs widely from that where the very house or shop is destroyed; or, where it is virtually so, by being within the distance prescribed by the particular act.

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[a] Sect. 55.

[b] *Walker* v. *London and Birmingham Railway Company*, 3 Q. B. 744.

[c] Sect. 18.

For what compensation is claimable.

A person entitled to a mere *easement* may claim compensation.[d] A person is entitled to compensation for any damage that *may* be sustained by him, by reason of the execution of the works;[e] thus, if he can show that he may sustain an injury from lowering a road to his land, abutting on the works, by impeding the access thereto, rendering additional fences necessary, or, by cutting off access by an embankment, and compelling him to open fresh communication, he will be entitled to compensation for such injuries.[a]

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[a] *R.* v. *Liverpool and Manchester Railway Company*, 4 Ad. & E. 650.

[b] In *Corrigall* v. *L. and B. R. Co.* evidence of loss of *goodwill, &c.*, was admitted to show that the house had been deteriorated in value. 5 M. & G. 219.

[c] *Kennedy* v. *Lee*, 3 Mer. 441; *Ex parte Farlow*, 2 B. & Ad. 341; *R.* v. *Hungerford Market Company*, 4 B. & Ad. 592, 594; Smith's Comp. of Merc. Law, tit. *Goodwill.*

[d] *Thicknesse* v. *Lancaster Canal Company*, 4 M. & W. 492.

[e] 8 & 9 Vict. c. 18, s. 18.

Speculative damages.

The jury are not, it is said, to give *speculative damages*. They would not be authorised, it is true, in awarding damages for mere *imaginary* evils; but, when it is proved or admitted that, in the execution of the works, a certain act is to be, or is done, they must, as men with reasoning faculties, speculate upon, or rather consider the nature of such act, and all its probable as well as necessary consequences. "Reason," says Bentham, "proceeding on the data furnished by experience, is capable of appreciating the different degrees of probability, and reaching that point of likelihood, which, in ordinary language, has received the name of moral certainty. The light by which we walk does not manifest to us the first principles of nature, or acquaint us with the utmost limits of her power; but it is sufficient for guiding our judgment in the ordinary transactions of life, and judicial decisions rest on the very same foundation." When the inquiry relates to the value of lands, &c. to be purchased, *and also* to compensation claimed for injury done, or to be done to lands, houses, good-will, &c., the jury ought to be directed to return, and they ought to return their verdict *separately* for the sum of money to be paid for the purchase, and for the sum of money to be paid by way of compensation. The Sheriff should not neglect this separate finding; for, as to stamp duty and other things, the omission creates great confusion to public companies. A verdict *conjunctim* would not be considered a nullity.[b] So where there are several interests to be compensated for, an assessment in one gross sum would be irregular, if not, in such a case, a nullity.[c]

How inquiry conducted.

The proceeding before the jury must be consistent with the precept, and the precept consistent with the notice. The land, therefore, mentioned in the precept, must be what is contained in the notice.[d] On the inquiry, the party claiming compensation shall be deemed the plaintiff, and shall have all such rights and privileges as the plaintiff is entitled to, in the trial of actions at law. This was introduced to regulate the general course of proceedings, to remove doubts concerning the right to begin, and to show, in other respects, how the inquiry was to be conducted. Taking together the statute and the general rule laid down by the judges as to the right to begin, the party claiming compensation will be the person in any case to begin, and if the other side produce any evidence he will be entitled to a reply.[e]

New trial, &c.

In case of misdirection, or even a perverse verdict, there seems to be no remedy either by motion for an inquiry *de novo*, or by mandamus for a second precept.[a]

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[a] *Reg.* v. *E. C. R. Co.*, 2 Q. B. 347; *Reg.* v. *B. and E. R. Co.*, cited in *Walford's* Law of Railways, 195.

[b] In *re L. and G. R. Co.*, 2 Ad. & E. 684; *Corrigall* v. *L. and B. R. Co.* 6 Sc. N. C. 264; 8 & 9 Vict. c. 18, s. 63.

[c] See *Rex* v. *The Trustees of the N. and W. Road*, 5 Ad. & E. 578.

[d] *Stone* v. *Commercial R. Co.*, 4 Myl. & Cr. 122; 1 Railw. C. 403. See *Walker* v. *L. and B. R. Co.* 3 Q. B. 744.

[e] *The King* v. *Gardner*, 6 Ad. & E. 117; *Reg.* v. *Sheriff of W.*, 2 Railw. C. 661; Phill. Ev. 836.

### *Notice by Company.*[b]

We —— being the promoters of a certain public undertaking called —— incorporated by an act of parliament made and passed in the —— year of the reign of, &c. intituled An Act &c. do hereby give you notice that for the purpose of carrying out the said undertaking and executing the works thereof we shall and do require from you all your right title claim benefit and interest of and in a certain dwelling-house and premises with the appurtenances situate and being at No. —— N. Street E. Road in the parish of —— in the county of M. and now in the occupation of —— [*or* " of and in a certain piece or parcel of land situate and being &c. that is to say"] [*here describe what is to be taken*]; and we do also hereby give you notice that we do intend and shall on the expiration of ten days from the service of this notice upon you issue our warrant to the Sheriff of the county of M. to require him to summon a jury to assess the value of your interest in the premises and the amount of compensation you may be entitled to from us in respect of the works of the said undertaking: And we do also give you notice that we are ready and willing to give you as and for the price and value of your said interest in the premises the sum of £—— and for compensation for any injury you may sustain by reason of the premises we are ready and willing to give you £——.[c] Given under our common seal and hands this &c.

To ——.

### *Notice by Claimant.*[d]

Whereas I am the owner and lessee for a term of —— years yet to come and unexpired of and in a certain dwelling-house and premises with the appurtenances now used and occupied by me as a public house and known by the name or sign of —— situate at —— in the parish of —— in the county of M. and within fifty feet of the L. and B. Railway which said public house [will be] has been and is deteriorated in value by the construction of the said railway: Now I do hereby give you notice and require of you within twenty-one days from the service of this notice upon you to issue your warrant to the Sheriff of the said county of M. requiring him by the said warrant to summon a jury to inquire into and assess the value of my interest in the premises and the amount of compensation I am entitled to for the loss and injury [that may be] sustained by me by reason of the premises; and I further give you notice that I am ready and willing to take for my interest in the premises the sum of £ —— and for compensation for such loss and injury the sum of £ ——. Dated, &c.

To ——

### *Warrant.*[e]

M. } Whereas we the promoters &c. [*as in notice suprà*] on the —— day to wit, } of —— A.D. 18— pursuant to the statute in such case made and provided did cause to be served a certain notice in writing under our common seal personally upon —— of which said notice was and is in the words and figures following [*notice*]. And whereas the said —— hath not accepted the offer therein contained or any part thereof and the question of value and compensation still remains disputed between us: We do hereby require and command you upon the receipt of this our warrant to summon a jury to determine the said differences and disputes in the premises; and herein fail not. Given under our common seal this &c.

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[a] *Reg.* v. *Eastern C. R. Co.*, 2 Dowl. N. C. 946.

[b] A notice from the Co. has the effect of creating the relation of vendor and purchaser; a Bill or claim in equity, or a mandamus at law, will lie. *Walker* v. *E. C. R. Co.*, 6 Hare 594; *Rex.* v. *Hungerford Market Co.*, 4 B. & Ad. 827.

[c] This is required by s. 38.

[d] See *Walker* v. *L. and B. R. Co.*, 3 Q. B. 744.

[e] When there is but one person Sheriff and he a shareholder (which they must know from their own books), the warrant cannot be directed to him, *ante*, p. 82, but when there are *two* persons, as in Middlesex and in some counties of cities, constituting *one* officer, it ought to be directed to the one, who is not a shareholder, and not to the coroner. See *Corrigall* v. *L. and B. R. Co.*, 6 Sc. N. C. 241: *Letsom* v. *Bickley*, 5 M. & S. 144.

## *Company's Notice of Inquiry.*

Take notice that a jury of the county of —— has been summoned and that an inquest will be held upon the value of your interest of and in —— [*as in notice and warrant*] and the compensation you may be entitled to from us in respect of the public works of the —— Co. and that the same will be tried on —— at —— o'clock A.M. before the Under-sheriff of the said county at the house of —— commonly called the —— at —— in the said county [*where counsel will attend*]. Given under our common seal this &c.

To ——.

## *Sheriff's Notice to Company.*

Take notice that I shall hold an inquest and proceed to inquire into the value of &c. [*as above*] on —— the —— day of —— next at ten o'clock A.M. at A. in the county of W. at the house commonly called —— when and where you are requested or some one on your behalf to attend. Dated &c.

To ——. High Sheriff.

## *Request to summon a Witness.*

We hereby request you to summon on the inquest to be held at —— on —— respecting certain matters in difference between us and —— one —— who is a material witness touching the matters in question. Dated &c.

To —— Sheriff of ——.

## *Request to View.*

We hereby request you to order the jury or any six or more of the jury summoned for the inquest to be held at &c. [*as above*] to view the place in controversy. Dated &c.

To —— Sheriff of ——.

## *Inquisition, &c.*[a]

W. to wit. } An inquisition indented taken at —— on —— before —— Sheriff of the county aforesaid by virtue of a certain warrant to the said Sheriff directed under the common seal of the L. and B. R. Co. and to this inquisition annexed to inquire of certain matters in the said warrant specified by the oath of —— [*names of jurymen*] honest and lawful men of the said county who being charged and sworn upon their oath say that *A. B.* hath sustained damages to the amount of £ ——; and the jurors aforesaid upon their oath aforesaid further say that the value of the interest of the said *A. B.* of and in &c. amounts to £ ——. In witness whereof as well I the said Sheriff as the said jurors have set our hands and seals to this inquisition the day and year above written.[b]

## *Judgment.*

Therefore it is considered that the said *A. B.* do recover against the said company the said several sums of £—— and £ ——; and the defendant in mercy &c.

—— High Sheriff.

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[a] Oaths and affirmations of witnesses and jurors, &c. will be found in p. 69.

[b] *Taylor* v. *Clemson*, 2 Q. B. 978; *Reg.* v. *The M. and L. R. Co.* 8 Ad. & E. 413. These must be sent to the clerk of the peace to be filed; s. 50.

# CHAPTER III.

## MINISTERIAL DUTIES.

His *Ministerial* duties are at once numerous, complicated, and important to himself and others. It is especially upon these matters that book-learning is necessary to him and to his officers, for a safe and efficient fulfilment of the requirements of the law.

His duty to summon juries, attend upon Courts of Record, &c. first presents itself for consideration.

### SECTION I.

Nature of his duties.

The Courts, upon which he is obliged to attend, in person, or by deputy, are the following:—1. The General and Special Commissions of Oyer and Terminer and Gaol Delivery. 2. The Court of General Sessions of the Peace. His duties are wholly ministerial, and mainly consist in summoning juries, proclaiming the assizes, attending the sittings of the Court, making his return to the precepts, and lastly, in carrying into execution the sentence of the law on criminals.

*Place* of assize.

By the 3 & 4 Will. c. 71, H. M. in Council is empowered, from time to time, to direct *at what places* in any county, assizes, and sessions of gaol delivery shall be held; and that they may be holden at more than one place in a county on the same circuit; likewise to divide counties, for the purpose of holding assizes in different divisions of the same county; and by the last section to direct the Court of C. P. at Lancaster to be holden at any one or more places in the county, and to divide the county for that purpose. The county of *Buckingham*, by the 12 & 13 Vict. c. 6, is under like regulations. Before the Commissioners, or Judges of assize go on circuit, they issue their precepts to the Sheriffs, to summon jurors for the trial of all issues, whether civil or criminal, which may come on for trial at the assizes, and directing the Sheriff also to summon a sufficient number of special jurymen.[a] As a printed panel of the common jurors summoned must, *seven* days before the Commission day, be made by the Sheriff, and kept in the office for inspection, the Sheriff must take care to issue his warrant in time, to satisfy the statute in that respect.

Judge's precept before circuit.

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[a] 15 & 16 Vict. c. 78, s. 105.

## *Warrant.*[a]

W. to wit. } —— Sheriff of the county aforesaid to *T. D.* my bailiff [the bailiff of the liberty of P.] greeting: by virtue of the precept of Sir J. P. Knt. one of the barons of her Majesty's Court of Exchequer of Pleas and of Sir J. T. C. Knt. one of the justices of our lady the Queen before the Queen herself at Westminster justices assigned to take the assizes in and for the said county I command you that you be and appear before the said justices at ——[b] in the county aforesaid on the —— day of —— next coming with all writs &c. And also that you cause to come before her said Majesty's justices at the time and place aforesaid such and so many honest and lawful men of the county aforesaid whose names are hereunder written to do those things which on the part of our said lady the Queen shall be then and there enjoined them; and I command you also that you make public proclamation in and through the whole county aforesaid[b] that all those who will prosecute any prisoner in any prison or gaol in the county aforesaid or at large on bail that they be then and there present to prosecute them as shall be just; and also that you give notice to all justices of the peace chief constables coroners stewards and bailiffs of liberties within the county aforesaid that they be then and there with their rolls records indictments and other memorandums to do those things which in this behalf shall belong unto them to be done. And further by virtue of the precept assigned to me directed I command you that you have before the said justices at the time and place aforesaid the bodies of the several jurors whose names are hereunder written; and that you yourself be then there in your own person to attend do and perform all those things which belong to your office: And that you have then and there the names of the said justices chief constables coroners stewards bailiffs of liberties jurors &c. Given &c.

(Seal of office.) —— High Sheriff.

## *Warrant to summon Common Jury.*[c]

W. to wit. } —— Sheriff of the said county to *T. D.* my bailiff greeting: These are to will and require you immediately upon sight hereof to warn and summon the several persons hereunder named personally to be and appear at the court house at —— on the —— day of —— next.

## *For Jury on a View.*

W. to wit. } —— Sheriff of the said county to *T. D.* my bailiff greeting: You are hereby required to warn and summon the several persons here undernamed personally to be and appear at the next assizes to be held for this county on —— the —— day of —— at —— to try certain issues joined in a cause now pending between *A. B.* plaintiff and *C. D.* defendant; *and the said persons are desired and requested to be and appear at the house known by the sign of* —— *in* —— *at* —— *o'clock in the* —— *noon of the same day where they will be attended by* —— *and* —— *persons appointed by the Court to show them the premises in question;*[d] and hereof fail not at your peril. Given &c.

(Seal of office.) —— High Sheriff.

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[a] These warrants, summonses, &c. are usually to be found printed. If anything is to be done within a *liberty*, the warrant should be directed to the bailiff of the liberty. The warrant must contain the *substance* of the precept, and by that the Sheriff must be guided in framing this warrant.

[b] *Proclamation* is usually made by advertisement in the county newspapers.

[c] For all issues civil and criminal, 15 & 16 Vict. c. 73, s. 105. This form is also sufficient for Grand Juries. It is usual to summon 23 on the Grand Jury. Special jurymen are not to exceed 48 in all. He must have notice *six* days before the Commission day, or six days before the first day of the sittings in *London* or *Middlesex* or adjournment day in *London*, that a special jury is required: if there be no such notice, no especial jury need be summoned. Ibid. s. 112.

[d] To this annex a panel of the names of the viewers only.

### *Return of the Assize Precept.*

The execution of this precept appears more fully by divers panels to the same precept annexed and further I have caused to be publicly proclaimed throughout my whole bailiwick that all who shall prosecute against those prisoners be then and there to prosecute against them as shall be just. I have also given notice to all justices of the peace mayors coroners escheators stewards and also to all chief constables and bailiffs of every hundred and liberty within my county that they be then and there in their own person with their rolls records indictments and other remembrances to do those things which to their offices in this behalf appertain to be done as is within commanded me.

The answer of —— High Sheriff.[a]

### *Certificate of View.*[b]

I do hereby humbly certify that I have caused the place in question to be shown to *A., B., C., D., E.,* and *F.* [*jurors that attend*] in the panel hereunto annexed as within commanded and required by the said writ.

—— High Sheriff.

It must be kept in mind that by *The Common Law Procedure Act* (15 & 16 Vict. c. 73, s. 104), the several writs of Ven. fac. Distringas, and Habeas Corpora juratorum, are abolished. The precept issued by the judges of assize is substituted. By that the Sheriff is directed to summon jurors for the trial of all issues, civil or criminal, which may come on for trial at the assizes. They are summoned as before, and divided into lists as before the act. The precept also directs him, not only to summon common jurors, but also special jurors, not exceeding forty-eight in all, for trying the special jury causes at the assizes. But if no notice be given to him in time (six days) that a cause is to be tried by a special jury, no special jury need be summoned. But a subsequent section is devoted to *jury*. Besides the return of the precept, &c., he has other duties which should not be overlooked. The High Sheriff, or his Under-sheriff, must be in constant attendance on the judges during their presence in his county. He must provide them with lodgings; a sufficient number of javelin men, &c. He must make the accustomed payments, which, upon proper vouchers being produced, will be allowed to him in passing his accounts. What are *usual* payments may be ascertained at the office of the former Under-sheriff. Not being fixed by statute or common law, they necessarily vary according to circumstances.

Respecting judges' lodging, &c.

If it be his misfortune to have to carry into execution the sentence of death upon any prisoner, he empowers another by letter of attorney to do it.

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[a] The panels are engrossed on parchment and fastened to the precept, *on the back of which precept is indorsed the above return;* and they should be *delivered* by the Sheriff to the judge or commissioner *at the time he opens the commission*, together with a panel of the Crown Calendar.

[b] The view must be had by *six* at least. 6 Geo. IV. c. 50, s. 23, and the names of the viewers must be certified in the return. See 15 & 16 Vict. c. 73, s. 114.

### *Authority to execute a Convict.*

To all to whom these presents shall come greeting: I —— of —— in the county of *W.* High Sheriff of the said county do hereby appoint authorize and depute *C. D.* of —— for me and in my stead to execute on the —— day of —— next the sentence of the law passed on the prisoner —— at the last assizes for the said county; and to do and perform all things that may be in anywise necessary or expedient in or about the premises.

(Seal of office.) —— High Sheriff.

There used to be, for this purpose, a warrant under the hand and seal of the judge; as still practised in the Court of the Lord High Steward, upon the execution of a Peer.[a] In the Court of the Peers in Parliament it is done *by writ* from the Queen.[b] That practice has, however, fallen into disuse; and, at this day, the Sheriff receives a copy of the calendar, signed by the judge, and another from the clerk of the assize, signed by him, containing the separate judgments in the margins; and the Sheriff executes according to the minute in the margin, if there be no reprieve. But, it should be observed, that this calendar is *a mere memorial* giving directions to no one; *the judgment, openly pronounced and entered, is that which empowers the Sheriff to execute.* *Rolle* would never sign any calendar; but gave his orders openly in Court, with a charge to the Sheriff and gaoler to take notice of them.[c] If a woman quick with child be sentenced to death, she may allege her being with child, in order to get the execution respited; and, thereupon, the Sheriff shall be commanded to take her into a private room, and to impanel a jury of matrons, to examine whether she be quick with child or not; and if they find her quick with child, the execution shall be respited till her delivery. *Coke* and *Standford* say, that a woman can have no advantage from being found with child, unless she be also found *quick* with child.[d] This may be so; but the bare suggestion of a doubt would be sufficient to stay the execution until the truth were known. Execution ought not to be awarded into a different county from that wherein the party was tried and convicted, except only where the record of attainder is removed into the Q. B., in which case the Court of Q. B. has power to order it where it thinks proper.[e] With regard to a person in the castle of Chester, it is enacted,[f] "that the *Sheriffs of the county of the city of Chester* (unless the Sheriff of the county be expressly ordered by the judge who tried him to execute such criminal within the county) *shall execute* sentence of death upon all criminals condemned to die *for offences committed within the county of Chester;* and the judges, or one

Execution.

Time.

*Place.*

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[a] 2 Hale's P. C. 409.

[b] See *Sir W. Raleigh's ca.* Cro. Jac. 496; *Lord Stafford's ca.* State Tr. 3 vol. p. 101; 2 Hale, 31; Foster, 43.

[c] Since 6 & 7 Wm. 4, c. 30, the time of execution is fixed by the Judge, and so of a sentence in the Central Criminal Court, 7 Wm. 4, and 1 Vict. c. 76.

[d] 3 Inst. 17; Stand. P. C. 198; *sed vid.* 2 Hawk. P. C. 658, n.

[e] *Rex* v. *Antrobus,* 2 Ad. & E. 807.

[f] 5 & 6 Will. 4, c. 1, s. 1.

of them, of oyer and terminer and gaol delivery, are empowered to order the Constable of the castle of Chester to deliver the criminals to the said Sheriffs, and to order the said Sheriffs to execute the criminal as such judges or judge shall think fit." This order is in place of a writ of Habeas Corpus, which, by the common law, would be requisite in order to remove him from the custody of the Constable of the castle, and to empower the Sheriffs of the city, or the Sheriff of the county, to carry the law into force.[a] Execution, when not otherwise provided for by Act of Parliament, should be done by the proper officer or his deputy; *by proper officer* is meant the person who has the *legal* custody of the convict.[b] Coke and Hale agree in this, that no execution can be warranted, unless it be according to the judgment. Whether the Queen can by her prerogative alter the judgment seems a *vexata quæstio.* The better opinion, however, seems to be, that she can alter it in *degree;* that is to say, she can *mitigate* the punishment, with regard to the pain or infamy of it.[c] The Sheriff cannot do so of his own authority. He should, at all such times, demand such a *posse comitatus* as will prevent a breach of the peace. He is a *conservator pacis* as well as Sheriff.

## SECTION II.

### SESSIONS OF THE PEACE.

His duties, as the ministerial officer of these Courts, are *ejusdem generis* as those required of him at the Court of oyer and terminer and general gaol delivery. But as he is obliged to render obedience and attendance only upon such sessions of the peace as are *Courts of Record,* it follows that he is connected, in his official character, only with the Court of general and general-quarter session of the peace. Upon this, the Sheriff must attend, either in person or by deputy, to return the precept, &c. In default of attendance, &c., the justices may fine or amerce him. If they do not insist upon his attendance, &c., the omission is merely from courtesy, and not from want of authority; for they have, in like matters, the same powers that judges of the assize have.[d] He is also punishable by them for any default in executing their writs, or precepts; for being an officer of that Court, he is of course amenable to it. These sessions are convened by two justices within the jurisdiction (one being of the *quorum*) or the Custos rotulorum, *and* one justice directing a precept to the Sheriff.[e]

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[a] 2 Ad. & E. 805, *Littledale,* J.

[b] Ibid

[c] Foster, 268, 270; 4 Bl. Com. 398.

[d] Dalt. Ch. 99, Hawk. P. C. b. 2, ch. 8; *The King* v. *Loveden,* 8 T. R. 615.

[e] Every precept to be issued for the return of jurors before * * * * *Court of sessions of the peace in England* * * and Wales, shall in like manner direct the Sheriff to return a competent num-

Warrants.

When the Sheriff has received the precept, he acts as he does on receiving the assize precept.[a]

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## Section III.

### JURIES.

Grand jury.

Grand jurors require no qualification *by estate*.[b] The grand jurors at the sessions of the peace must be qualified according to the statute of 6 Geo. 4, c. 50, s. 1. The Sheriff of Yorkshire must summon forty-eight on the grand jury at the assizes, freeholders and copyholders (each person having 80*l.* land *per annum*), and forty at the sessions. "By the common law," says Hawkins, "every indictment must be found by 12 men, at the least; every one of whom ought to be of the same county, and returned by the Sheriff, or other proper officer, without the nomination of any *other* person whatsoever; and ought, also, to be a freeman, and a lawful liege subject; and, consequently, neither under an attainder of any treason or felony, nor a villein, nor alien, nor outlawed, whether for a criminal matter, or, as some say, in a personal action."[c] Twenty-three is the number to be summoned. A presentment by less than 12 cannot be; but if there be 12 assenting, the fact of dissent on the part of others is not material; in other words, there must be an unanimous finding of 12 of their number.[d] An alien or outlaw, or other disqualified person, might, it seems, be challenged by one who is under prosecution for any crime before he is indicted. In some cases, indictments have been quashed.[e]

Common jurors.

*In England*, every man (except as hereinafter excepted) be-

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ber of good and lawful men of the body of his county, qualified according to law, and shall not require the same to be returned from any hundred or hundreds, or from any particular venue within the county, and that the want of hundredors shall be no cause of challenge; any law custom or usage to the contrary notwithstanding; 6 Geo. 4, c. 50, s. 13. The qualification by estate of persons liable to serve on *grand* juries and *petty* juries in Courts of sessions of the peace, is the same as the qualification of persons liable to serve on juries in Courts of nisi prius, &c.; s. 1; and the Sheriff must return the names of men contained in the jurors' book for the then current year, or for the preceding year, as the case may be; s. 14. The Common Law Procedure Act, 15 & 16 Vict. c. 73, does not apply to these Sessions.

The justices out of session, as well as from their sessions, may in any case issue their precepts, &c. to the Sheriff, and he must execute the same. Dalt. c. 99; Hawk. P. C. b. 2, c. 8. Without such precept to the Sheriff no one is bound to attend, but if parties do attend, and the business is regularly transacted, the proceedings are valid; 2 Ld. Raym. 1238. The precept ought to bear *teste fifteen days* before the return, and ought to be delivered to the Sheriff forthwith, that he may have sufficient time to proclaim the sessions and to give the proper notices.

[a] *Ante*, p. 91.

[b] *Anon.*, R. & R. Rep. 177; Hawk. P. C. b. 2, ch. 25; 4 Bl. Comm. 306.

[c] Hawk. P. C. b. 2, ch. 25.

[d] Hale, P. C. ch. 22. Bl. Comm. b. 4, ch. 23; *The King* v. *Marsh*, 6 Ad. & E. 236; 2 Burr. Rep. 1088, n.

[e] See 6 Ad. & E. 236.

tween the ages of twenty-one and sixty, residing in any county in England, who shall have in his own name, or in trust for him within the same county, 10*l.* by the year above reprizes in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together in fee simple, fee tail, or for the life of himself or some other person, or who shall have within the same county 20*l.* by the year above reprizes in lands or tenements held by lease or leases for the absolute term of twenty-one years or some longer term, or for any term of years determinable on any life or lives, or who being a householder shall be rated or assessed to the poor-rate or to the inhabited house duty in Middlesex on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*, or who shall occupy a house containing not less than fifteen windows, shall be qualified to serve as a juror."[a]

*In Wales*, "the being qualified, to the extent of *three fifths* of any of the foregoing qualifications," is enough to make a person liable to serve as a juror.

In cities, boroughs, and towns corporate, the qualification seems to be "moveable goods and substances to the clear value of 40*l.*"[b]

*De medietate linguæ.*

Temporary exemptions.

Disqualifications.

*In London*, the qualification required is, that a person be a householder, or the occupier of a shop, warehouse, counting-house, chambers, or office for the purpose of commerce within the city, and have lands, tenements, or personal estate of the value of 100*l.* The same qualification is required, on *writs of inquiry*, executed in London, or, in any county in England or Wales, as in trials at nisi prius; but if executed in any liberty, franchise, city, borough, or town corporate, not being a county, or in any city, borough, or town, being a county of itself, the qualification is not affected by the 6 Geo. 4, c. 50. In a *de medietate linguæ* (allowed in cases of *felony* and *misdemeanor*) the aliens need no qualification by estate.[c] The inhabitants of the city and liberty of Westminster are exempted from serving on juries at the sessions of the peace for Middlesex.[d] In *Middlesex*, no person shall be returned to serve on a jury at nisi prius, who has served as a juror in either of the two preceding terms or vacations, having the Sheriff's certificate of having so served. And no person shall be returned to serve at the assizes, who has before served in Yorkshire within four years; in Wales, Hertfordshire, Cambridgeshire, Huntingdonshire, or Rutlandshire, within one year; or, in any other county, within two years, having the Sheriff's certificate of having so served; which certificate the Sheriff or Under-sheriff, on application to him, is bound to give to every *common* juror on payment of one shilling. One who is not a *natural* born subject, is absolutely disqualified from serving on juries or inquests, except as a juror *de medietate linguæ*. Persons under outlawry or excommunication; persons attainted of any treason, or felony, or convicted of any infamous crime, unless they have obtained a free pardon, are absolutely disqualified from serving on juries, or inquests, in any Court, on any occasion whatsoever.[a] No justice is to serve as a juror, at any sessions, for the jurisdiction of which he is a justice. The way in which the jurors' names, additions, &c., are brought within the Sheriff's reach, is this:—the clerk of the peace issues his warrant to the high constable, commanding the latter to issue his precept to the churchwardens and overseers of the several parishes, and to the overseers of the several townships, requiring them to prepare, before the first day of Sept. then next ensuing, a true list of all men residing within their respective parishes and townships, and liable to serve on juries. *Forthwith*, after receipt of the high constable's precept, the churchwardens prepare an *alphabetical* list of all persons liable to serve; and affix the same during the three first Sundays in the month of Sept. on the principal door of every church, chapel, and other public place of religious worship, within their respective parishes or townships, having first subjoined a notice, that objections will be heard by the justices of the peace, at a time and place to be mentioned in such notice, and signed by them. Petty sessions are held, the last week in Sept., when the lists must be produced, considered, reformed, and allowed. After allowance, by the petty sessions, the high constable receives the lists so allowed; and delivers the same to the Court of Quarter Sessions next following, on the first day of its sitting, attesting on oath his receipt of every such list from the Petty Sessions, and that no alteration has been made in them since his receipt thereof. These lists are, thereupon, recorded by the clerk of the peace; and by him copied into a book in alphabetical order. This book must be delivered to the Sheriff or his Under-sheriff, within six weeks next after the close of such sessions. This book is the "*Jurors' Book.*" It is used for one year only, beginning on the first of Jan., after it comes into the hands of the Sheriff or Under-sheriff. The jurors are returned from this book: provided, however, there be no jurors' book, in existence, for the current year, they may be returned from the book of the year preceding. In every county in *England* (except the counties palatine, and except in causes to be tried at bar or by a special jury) *no less than forty-eight, nor more than seventy-two*, must appear in the panel annexed to the jury process (Judges' precept): by order of the Judges, however, the number may be increased to 144; and, in places where the session is of long duration, the Sheriff must apply to them for leave to summon *two sets* of seventy-two, or whatever number below 144 he may think

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[a] 6 Geo. 4, c. 50.

[b] See Hawk. P. C. b. 2, ch. 43, s. 24, 23 Hen. 8, c, 13, 4 & 5 Wm. c. 24.

[c] Sect. 47.

[d] 6 Geo. 4, c. 30, s. 49.

**Mode of obtaining the jurors' book.**

**Jurors' book.**

**Number on panel.**

**Judges' precept.**

**In sets.**

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[a] S. 347.

sufficient, the order will be made. In his summons he must specify on which set the juror is the first or second, and at what time the attendance of such juror will be required.[a] The mode of summoning jurors is pointed out by the statute, and must be strictly complied with. It is by showing the summons to the person; or, in case of absence from the usual place of abode, by leaving with some person there inhabiting, a note in writing, under the hand of the Sheriff or other proper officer, containing the substance of the summons. *Special jurors* are to be summoned in like manner. The jurors for London or Middlesex are to be summoned as before the statute. If any officer take money to excuse persons from serving; or summon any other, but those named in his warrant, signed, and directed to him; or, summon any juror less than the statutory number of days before the day of attendance (seven days before the Commission day at least),[b] the Court is empowered to set such fine upon the officer offending as it shall think fit; in a case before the 6 Geo. 4, c. 50, a summoning officer was fined 200*l.* for receiving money to excuse persons from serving on juries, and for too often summoning those who refused to pay.[c] A printed panel of the jurors summoned must be kept, as already pointed out.[d]

Mode of summoning jurors.

Officers offending.

Jury in criminal matters.

The Judges' precept directs the Sheriff to summon common jurors for the trial of all issues, civil or criminal, that may be for trial.[e] The qualification of all common jurors is the same, except on indictments for treason or felony. The Supreme Courts may order a criminal case to be tried before a special jury, or may order one to be struck, as the case may be.[e]

When a person is indicted for high treason or misprision of treason, in any Court, other than the Court of Q. B., a list of the petit jury must be delivered to him, ten days before the arraignment, in the presence of two or more credible witnesses. If in Q. B., it may be delivered to the party indicted, at any time after the arraignment, so as the same be delivered ten days before the day of trial; but he is not entitled to this panel, if his crime relate to H. M.'s life or person, or to the counterfeiting her coin, the Great or Privy Seal, her sign manual or privy signet.[f]

De medietate linguæ.

An alien, in cases of felony and misdemeanor, has the right to be tried by a jury *de medietate linguæ*, that is, one-half of the jury being aliens—foreigners *generally*, and not exclusively the prisoner's countrymen.

On the prayer of every alien so indicted, the Sheriff must, by command of the Court, return a jury so composed. It has been stated, that no qualification by estate is required for a juror of this kind; nevertheless, he may be challenged.[a] If there be default of an alien, it must be supplied by an *alien tales*, for the words are relative. If tried by Englishmen only, the judgment is not erroneous.[b]

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[a] The 6 Geo. 4, c. 50, is not, I conceive, in this respect altered by the 15 & 16 Vict. c. 76.

[b] 15 & 16 Vict. c. 76, s. 106.

[c] *Rex* v. *Whittaker*, Cowp. Rep. 752.

[d] *Ante*, p. 91.

[e] 6 Geo. 4, c. 50, s. 30, *post*, 99.

[f] See *Reg.* v. *Frost*, 2 Mood. C. C. 140; 9 C. & P. 129.

**Special jurors.**

Within ten days after the receipt of the jurors' book for the current year, the names of all men, described therein as *esqs.* or as persons of higher degree, or as *bankers*, or *merchants*, must be taken out by the Sheriff, or Under-sheriff, or Secondary, in alphabetical order, together with their respective places of abode and additions, in a separate list, to be subjoined to the jurors' book; and, for the purpose of balloting, these names must be numbered 1, 2, 3, and so on; and the numbers written on separate cards or pieces of parchment, of equal size, and secured in a drawer for the purposes hereinafter mentioned. The Superior Courts have the power of ordering special juries to be struck in any case whatsoever, whether civil or criminal, or on any penal statute, excepting only indictments for treason or felony.[c]

**Special jurors, not exceeding forty-eight in number, to be summoned to try all special jury causes at assizes.**

The Common Law Procedure Act (15 & 16 Vict. c. 76, s. 108), fully explains all that relates to this matter:— *The precept issued by the judges* of assize as aforesaid shall direct the Sheriff to summon a sufficient number of *special jurymen*, to be mentioned therein, *not exceeding forty-eight* in all, to try the special jury causes at the assizes; and the persons summoned in pursuance of such precept shall be the jury for trying the special jury causes at the assizes, *subject to such right of challenge as the parties are now by law entitled to*; and a printed panel of the special jurors so summoned shall be made, kept, delivered, and annexed to the nisi prius record, in like time and manner and upon the same terms as hereinbefore provided with reference to the panel of common jurors; and upon the trial the special jury shall be balloted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors: *Provided* that the Court or a Judge, in such case as they or he may think fit, may order that a *special jury be struck according to the present practice*, and such order shall be a sufficient warrant for striking such special jury, and making a panel thereof *for the trial of the particular cause*.

**Mode of obtaining a special jury in country causes.**

In any county, except *London* and *Middlesex*, the plaintiff in any action, except replevin, shall be entitled to have the cause tried by a special jury, upon giving notice in writing to the defendant, at such time as would be necessary for a notice of trial, of his intention that the cause shall be so tried; and the defendant, or plaintiff in replevin, shall be so entitled, on giving the like notice within the time now limited for obtaining a rule for a special jury: Provided that the Court or a Judge may at any time order that a cause shall be tried by a special jury, upon such terms as they

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[a] Sect. 47.

[b] *Cæsar* v. *Corsini*, Cro. Eliz. 306; Poph. 35; *Denbaud's ca.* 10 Co. 104; Dyer, 27 b.

[c] Sect. 30.

Special juries in London and Middlesex how struck.

or he shall think fit. In *London* and *Middlesex* special jurors shall be nominated and reduced by and before the Under-sheriff and secondary respectively, in like manner as by the master before this Act,[a] upon the application of either party entitled to a special jury, and his obtaining a rule for such purpose; and the names of the jurors so struck shall be placed upon a panel, which shall be delivered, and annexed to the nisi prius record, in like manner and upon the same terms as hereinbefore provided with reference to the panel of common jurors; and upon the trial the special jury shall be balloted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors.

Remedy for delay by notice of trial by special jury.

Where the defendant in any case, or plaintiff in replevin, gives notice of his intention to try the cause by a special jury, and the venue is in *London* or *Middlesex*, the Court or a Judge, if satisfied that such notice is given for the purpose of delay, may order that the cause be tried by a common jury, or make such other order as to the trial of the cause as such Court or Judge shall think fit. Where notice has been given to try by special jury, either party may, six days before the first day of the sittings in *London* or *Middlesex,* or adjournment day in *London*, or commission day of the assizes, give notice to the Sheriff that such cause is to be tried by a special jury; and in case no such notice be given no special jury need be summoned or attend, and the cause may be tried by a common jury, unless otherwise ordered by the Court or a Judge. In all cases where notice is not given to the Sheriff that the cause is to be tried by a special jury, and by reason thereof a special jury is not summoned or does not attend, the cause may be tried by a common jury, to be taken from the panel of common jurors, in like manner as if no proceedings had been had to try the cause by a special jury.

Notice to sheriff of trial by special jury.

If special jury not summoned, cause to be tried by a common jury.

View.

It may be also that for the better understanding of the real matters in dispute between the parties in Court, and of the evidence bearing upon the issues on the record, that some of the jurors should themselves see, in other words, have *a view* of the place or premises, or of the mode or process of the manufactory in question. Before the statute of 4 & 5 Anne, c. 16, s. 7, *a view* could not be obtained until the full jury were sworn, after which a juror was withdrawn, and the parties entered into a consent rule for a view; it is needless to dwell upon the delay and inconvenience of such a practice, or why the statute was passed: then followed the 3 Geo. 3, c. 25, s. 14, which was almost *verbatim* embodied in the following stat. of 6 Geo. 4, c. 50; the 23rd sect. of which enacted that "*in any case either civil or criminal*, or on any penal statute depending in any of the said Courts of Record in Westminster, or in the counties palatine or great sessions in Wales, if it shall appear to any of the respective Courts, or to any Judge thereof in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues; in every such case such Court, or any Judge thereof in vacation, may order a rule to be drawn up containing the usual terms, and also requiring, if such Court or Judge shall so think fit, the party applying for the view to deposit[a] in the hands of the Under-sheriff, a sum of money to be named in the rule for payment of the expenses of the view, and commanding special writs of venire facias, distringas or habeas corpora, to issue; by which the Sheriff, or other minister to whom the said writs shall be directed, shall be commanded to have *six* or *more* of the jurors named in such writs, or in the panels thereto annexed (who shall be mutually consented to by the parties, or if they cannot agree, shall be nominated by the Sheriff or such other minister as aforesaid), at the place in question some convenient time before the trial, who then and there shall have the place in question shown to them by two persons in the said writs named, to be appointed by the Court or Judge, and the said Sheriff or other minister who is to execute any such writs, shall, by a special return upon the same, *certify* that the view hath been had according to the command of the same, and shall specify the names of the viewers." And by the next section, it is provided that the viewers are to be *first* sworn on the jury at the trial, and then so many only shall be added to the viewers who shall appear as shall, after all defaulters and challenges allowed, make up a full jury of twelve.[b]

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[a] See 1 Chit. Arch. 347.

View to be by rule without writ.

The 15th & 16 Vict. c. 76, s. 114, enacts, "A writ of view shall not be necessary or used; but, whether the view is to be had by a common or special jury, it shall be sufficient to obtain a rule of the Court or Judge's order, directing a view to be had; and the proceedings upon the rule for a view shall be the same as the proceedings heretofore had under a writ of view: and the Sheriff, upon request, shall deliver to either party the names of the viewers, and shall also return their names to the associate for the purpose of their being called as jurymen upon the trial."

Duties and conduct of showers.

The duties and conduct of the showers will be best explained by the following case of *Goodtitle* d. *Symons* v. *Clark*:[c]—" After the merits of the cause had been determined at the assizes by a special jury after a trial of twenty hours, defendant moved to set aside the verdict upon affidavit that plaintiff's shower at a view, pursuant to a rule of Court previous to the trial, had misbehaved himself by telling the viewers this place is called Abehalls Yal, and this Conygree Hill (which were not the places in question), and saying, these cottages pay Mr. Symons fivepence or sixpence a year rent; defendant insisting that nothing more than the place in question, which was one single cottage, should have been shown to the viewers: upon hearing counsel on both sides the Court discharged the rule, being of opinion *that on a view the showers may show marks, boundaries, &c., to enlighten the viewers; and may say to them, these are the places which on the trial we shall adapt our evidence to; the jury could have no light from looking at the cottage only.* The question to be tried was, whether it stood within Mr. Symons' manor or not. Had an ancient man been produced to the viewers, and he had acquainted them that he had known the place many years, and given account of the boundary, &c., this would have been improper, because it is giving evidence before the trial. *Belfield* for defendant; *Booth* and *Eyre* for plaintiff."

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[a] See *Stones* v. *Menhem*, 2 Exch. Rep. 386.

[b] Make out a præcipe of the rule for a view, also a memorandum of the name and place of abode of your own showers, and also of your opponent's showers, which may be obtained from the opposite attorney, also of time and place of meeting; on the production of them the master or his clerk of the Court will draw up the rule. If the opposite party will not name a shower, the master will, on an appointment obtained for that purpose, name one *ex parte*. A copy of the rule must then be served on the opposite attorney, and the original left at the Sheriff's office, together with a list of the jury if special, and he will summon them; if common he will summon such as he may think fit. See Bagley's Pr. 328; Arilb. Pr. 407, 6th Edit. *Stones* v. *Menhem*, 2 Exch. 384.

[c] Barnes' Notes, 457.

A view is usually granted in actions of a local nature, as injuries to land, houses, waste, nuisances, and the like.[a] The mode or process of a manufactory may be viewed. In an action for work and labour, as a bricklayer, the Court refused to allow one.[b] The Under-sheriff's duties, on a view, seem to be simply those of an ordinary officer of the Court in charge of a jury; he is there to prevent any improper interference of strangers, and afterwards to certify, to the justices of assize, that the rule of Court, or the Judge's order, as the case may be, has been complied with.

**Sheriff's duties on view.**

By the 6 Geo. 4, c. 50, s. 37, "where a full jury shall not appear before any court of *assize or nisi prius*,[c] or before any of the superior civil courts of the three counties palatine, or before any court of great sessions, or where, after appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, every such Court, upon request made for the king by any one thereto authorised or assigned by the Court, or on request made by the parties, plaintiff or demandant, defendant or tenant, or their respective attornies, in any action or suit, whether popular or private, shall command the Sheriff or other minister, to whom the making of the return shall belong, to name and appoint, as often as need shall require, so many of such other able men of the county then present as shall make up a full jury; and the Sheriff or other minister as aforesaid shall, at such command of the Court, return such men duly qualified as shall be present or can be found to serve on such jury, and shall add and annex their names to the former panel, *provided that where a special jury shall have been struck for the trial of any issue, the talesmen shall be such as shall be impanelled upon the common jury panel* to serve at the same Court, *if a sufficient number of such men can be found*; and the king, by any one so authorised or assigned as aforesaid, and all and every the parties aforesaid, shall and may, in each of the cases aforesaid, have their respective challenges to the jurors so added and annexed, and the Court shall proceed to the trial of every such issue with those jurors who were before impanelled, together with the talesmen so newly added and annexed, as if all the said jurors had been returned upon the writ or precept awarded to try the issue."

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[a] *The King* v. *Hudson*, cited in Lee's Pract. Dict. 1371.

[b] *Stones* v. *Menhem*, 2 Exch. 382.

[c] On a trial at bar, there cannot be a *tales*. *Buron* v. *Denman*, 1 Exch. 769.

**Alien tales.**

If an alien make default, his place must be supplied by an *alien tales*; for there must be a *medietas* of aliens, or none; if none, that is, by Englishmen only, the judgment is not erroneous.[a] It is not necessary that the tales be selected out of persons *accidentally* present, but may be out of those whose presence the Sheriff has previously taken means to obtain.[b]

## SECTION IV.

### POSSE COMITATUS.

FREQUENT reference will be found to the Sheriff's power and duty to raise the *posse comitatus*, or power of the county; to aid him in the execution of writs, to suppress disturbances, and the like. This is well and elaborately given by *Dalton*.[c] "The Sheriff or his Under-sheriff or Bayliff, &c., may (nay ought if need be) to take the power of the county (sc. what numbers of persons they shall think good) to aid him, or them, to execute in every behalf the king's process or writ (be it by a writ of execution, replevin, capias, &c., or any other writ),[d] it being the king's commandment. And such as shall not assist the Sheriff, &c., therein, *being required*, shall pay a fine to the king. Bro. Parliament and Fines, 37; and Trespass, 266. The stat. of Westm. 2, c. 39, is direct and full in this point, saying, 'Sheriffs make many times false answers, returning that they could not execute the king's precept for the resistance of some great men; wherefore, let the Sheriff beware from henceforth, for such manner of answers redound much to the dishonour of the king; and, as soon as his bayliffs do testifie that they have found such resistance, forthwith all things set apart (taking with him the power of the shire) he shall go in proper person to do execution,' &c. See *hic antea*.

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[a] See *ante*, p. 98.

[b] *Rex* v. *Dolby*, 2 B. & C. 104.

[c] Ch. 95; see also ib. ch. 4.

[d] See 4 C. B. 630, and 6 ib. 530.

What persons bound to assist.

But, it seemeth, by this stat., that the Sheriff shall not take the power of the county, but only *post queremoniam factam*, and not before. And, yet, it is holden, that the Sheriff may do it by the common law; for *quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.* See 3 H. 7, fol. 1, and Co. 5, 115. Also, by the stat. of Westm. 1, cap. 17, if a distress be impounded in a castle or fortress, and detained, the Sheriff or Bayliff, taking with him the power of the shire, &c., may cause the said castle or fortress to be beaten down. See *hic postea.* And by the book 19 E. 2, Fitz. Exec. 147, upon a writ of seisin, the Sheriff returned that he could not deliver seisin for resistance; and, for that the Sheriff did not take the power of the county, according to the statute, he was amerced twenty marks. So, in a replevin, if the Sheriff return that the cattle are in a fort or a castle, so as he cannot make deliverance, he shall be amerced, *causá quá suprà.* Note, where the Sheriff or other officer is enabled to take the power of the county, they may command and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants and apprentices, and of all other such *persons being above the age of* 15 *years and that are able to travel;*[a] to which purpose also, see the Sheriff's patent of assistance (here before, fol. 8), whereby there is commandment given to all archbishops, bishops, dukes, earls, barons, knights, and all other the king's subjects within the same county, to be aiding to the Sheriff, in whatsoever belongeth to his office. And, in such cases, they are not appointed any number; but, it is referred to the discretion of the Sheriff, &c., *what number they will have to attend upon them, and how and in what manner they shall be armed, weaponed, or otherwise furnished.* The Sheriff's bayliff, to execute a replevy, took with him three hundred men armed (*modo guerrino*) sc. with brigandines, jackes, and guns; and it was holden lawful; for the Sheriff's officer hath power to take assistance as well as the Sheriff himself. B. Riots, 2. *Vide* Co. 5, 72. Also, the Sheriff may take *posse comitatus* in defence of the realm, when any of the king's enemies shall invade the land, &c. The Sheriff also may take *posse comitatus* (any number that he shall think meet) to pursue, apprehend, arrest, and imprison traytors, murderers, robbers, and other felons, or, such as do break or go about to break or to disturb the king's peace. And, it seemeth, that in all cases where the Sheriff may take *posse comitatus*, there also he may make proclamation, commanding, in the king's name, all persons (meet) to come and go with him, and to aid him, for the apprehending of traytors, or felons, suppressing of rioters, pacifying of an affray, or the like, or, in any other thing belonging to his office, where he shall find any resistance. . . . . .

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[a] Between 15 and 70. 2 Inst. 194. Under the Riot Act (57 Geo. 3, c. 19, s. 10) all persons *of age and ability* to assist.

The Sheriff, also, may take *posse comitatus,* to execute the precept, or warrant of the justices of peace, as in case of forcible entry, to make restitution, &c. But, it seemeth, in such cases, where the power of the county is to be raised or taken, that the *bayliff must have warrant from the Sheriff* to do it, and that he must be a known bayliff or officer that must do it. Note, that *the Sheriff, or his officers, may take the power of the county by force of the common law.* . . . . . . *Also the Sheriff's bayliffs, or, his servant,* having the Sheriff's warrant, *hath the same authority that the Sheriff himself hath; and every man is bound to aid them in their business; and that both by the common law and common reason.* . . . . . . If the Sheriff (or his Under-sheriff, Bayliff, or servant, *having the Sheriff's warrant*) shall take *posse comitatus* with them *without any sufficient cause,* yet, such as therein shall be aiding to the Sheriff, or his said officers or servant, may well justifie such their doing by the commandment of the Sheriff or his said officers, &c. 5 H. 7, 4, 5."

By the common law.

A bailiff with like powers.

## SECTION V.

## CONSERVATOR PACIS.

EVERY Sheriff is, by the common law, a principal and special *conservator of the peace* in every place within his county; and hath committed unto him the custody of his county, for the time that he is Sheriff; and is to see the peace thereof kept and maintained; and, upon request to him made, he may command, and cause another to find sureties for the peace; and may take the same surety by *recognizance.*[a] Yet a Sheriff ought not (in other things) to execute the office of a justice, in the same county where he is Sheriff, during the time that he is Sheriff; and all and every acts to be done by any Sheriff, by authority of any commission of the peace during the time of his Sheriffwick, shall be void and of none effect. But if he be put into the commission of the peace before he be Sheriff, and then he is chosen Sheriff, and that commission of the peace continueth after that he is discharged of his office of a Sheriff, *quære* if he may not then sit or execute the office of justice of peace by force of that commission without taking a new oath. It seems he may.[b]

Common law power.

Cannot act as a magistrate.

But every Sheriff (by the common laws of this realm) may do, and is bound to do, his best endeavour for the conservation of the king's peace, and may and ought to pursue, apprehend, arrest, and imprison all traitors, murderers, robbers, and other felons, and all such other as do break, or go about to break or disturb

Arrest, felons, &c.

Roll 1, part 237.

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[a] Co. Litt. 168.

[b] Dalt. ch. 4. Hawk. P. C. b. 2. ch. 8. He is now appointed by *warrant* under 3 & 4 Wm. 4, c. 99; but by sect 3, it seems to be of the same effect as a Patent under the Great Seal.

the king's peace within his county, (as is before showed,) and to that purpose the Sheriff may take (of that county where he is Sheriff) any number that he shall think meet to aid and assist him: and every man being required ought to be aiding therein to him, and if any man (being required) shall refuse to aid the Sheriff therein they shall be fined to the king: Br. Fines, 37. And by the statute of 3 Ed. 1, cap. 9, upon any felony committed, all men generally shall be ready at the commandment of the Sheriff (and at the cry of the county) to pursue and arrest all felons (when any need is) as well within franchises, as without; and they which make default and thereof be attainted, shall make a grievous fine to the king: and it seemeth the Sheriff may attach all such persons making such default, to appear before the justices of gaol delivery, there to answer their said default.

Riot Act, 57 Geo. 3, c. 19.

By the 57 Geo. 3, c. 19, if any persons, *exceeding fifty* in number, shall be assembled, contrary to the provisions of the statute, (amongst other persons named) the Sheriff or his Under-sheriff of the county, city, or town, where such assembly shall be, is commanded to make the following

### *Proclamation.*

Our Sovereign Lady the Queen chargeth and commandeth all persons here assembled immediately to disperse themselves and peaceably depart to their habitations or to their lawful business upon pain of death.

God save the Queen.

And, if the persons so assembled, or, twelve or more of them, after proclamation made as aforesaid, shall continue together, and shall not *disperse within one hour*, the Sheriff or his Under-sheriff are empowered to command *all persons of age or ability* to assist in apprehending them; and, if any rioter be there killed, they are indemnified from the consequences.

## SECTION VI.

### QUEEN'S BAILIFF.

His oath.

THE Sheriff might not improperly be termed the Treasurer of the County;[a] for it is his duty, under the solemn obligation of his oath, truly to preserve the Queen's rights of her crown within his county, viz. *lands*, *rents*, *franchises*, *suits*, or *services*, and *all that belongs to the Crown*; that he will not respite or delay to levy the Queen's *debts*; that he will truly and faithfully acquit at the Exchequer all those of whom he shall have received any debt or duties belonging to the Crown; and will truly set and return reasonable and due issues of persons in his bailiwick. He swears that he will not respite or delay to levy the Queen's *debts.*[a] Now, debts may be due to the Queen in different ways, viz. by attainder, outlawry, forfeiture, gift, judgment, recognizance, or specialty. These may be levied, either upon the body or goods of the debtor, or his sureties; or, upon their lands in their own hands, or in the hands of their heirs or feoffees, or of any other person claiming from them by descent or purchase. Also the executors, administrators, assignees, and other possessors of the goods of the Queen's debtor are chargeable to the Queen's debt.[b] A distress of this kind may (after 15 days) be *sold;* if the debt be not satisfied in the meantime.[c] But for the Queen's debts, fines, issues, amerciaments, penalties, and forfeited recognizances, the Sheriff is not chargeable or accountable; neither may he distrain for, or otherwise levy the same, *until he shall have process to levy them.* Debts.

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[a] Dalt. ch. 4.

If demanded, the process of the Exchequer must be shown to the debtor, and tallies, or acquittances, given for all payments.[d] He may distrain for the Queen's debt, in the Queen's highway, or in the common street; except they be the beasts or goods of a parson. The estreats of justices of the peace are a sufficient warrant to him to levy such as arise before them.[e]

*Concerning wreck of the sea*, the stat. of Westm. 1 declares that where a man, a dog, or a cat escape quick or alive out of the ship to the land, no such ship or barge, nor anything within them, shall be adjudged wreck; but that the goods shall be saved and kept by the view of the Sheriff (or Coroner), and shall be delivered into the hands of such as are of the town where the goods are found; so that if any sue for those goods, and prove that they were his, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the king, (as belonging to him by his prerogative,) and shall be seized by the Sheriff, or Coroner, and praised by a jury, and delivered to the town, who shall answer therefor, &c. But by the stat. made 27 E. c. 13, if any ship shall perish on the sea, and the goods come to land, which be no wreck, the owner shall be required to prove the said goods to be his own: and upon proof thereof they shall be presently delivered, paying to them that have saved and kept the same, convenient for their travel, by the discretion of the Sheriff, or other officers, with the assent of four or five of the best or most sufficient discreet men of the country. Where wreck belongeth to another than to the Queen, he shall have it in like manner as the Queen should; but there the Sheriff is not to meddle therewith: As where the lord of any liberty, franchise, or manor, hath wreck granted by charter, &c., or hath had any wreck by prescription, &c., for otherwise the Queen by her prerogative shall have the wreck of the sea throughout the realm. *Nota, que wreck de meere serra trie per le common ley, et nemy per ley Admiralty.* 15 R. 2, c. 3. By the statute *de prærogativa* Br. Wreck, 8. 17 E. 2, c. 11.

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[a] Dalt. ch. 10.

[b] Ibid.

[c] Ibid.

[d] Ibid.; 3 & 4 Wm. 4, c. 99, 32.

[e] Ibid. ch. 12.

*regis* (17 E. 2,) the king shall have wreck of the sea throughout the realm (except in certain places privileged by the king) which statute also is but a declaration of the common law. Co. 5, 108.

Whales, &c. Also by the same statute of prerog. regis, the king shall have

Br. lib. 8, 120. whales and great sturgeons taken in the sea, or elsewhere within the realm, (except in certain places privileged by the king,) which was also the common law before the said statute. Co. 5, 108. Plo. 315. Also it seemeth by the common law, that the king (by his prerogative) shall have other fishes royal taken in the sea, or elsewhere within this realm, as the porpus, &c., 39 E. 3, Br. Prerog. 35, for the excellency of the person of the king doth draw and appropriate unto him the things of excellency. Plo. 315. Vide Br. Prerog. 35, *que le Roy avera.*

Lands forfeited. *As to Lands of Freehold Tenure:*—On attainder for *High Treason,* or for abetting, procuring, or counselling the same, the offender forfeits the inheritance of all such lands. For the crime of murder, or of abetting, procuring, or counselling the same, the estate is forfeited to the Crown for a year and a day; and after that period, in consequence of the corruption of blood, it escheats. For felonies, other than these hereinbefore named, it is forfeited during the natural life of the offender; and after that, by virtue of the 54 Geo. 3, c. 145, the heir, or other person entitled, may enter, just as if no attainder had taken place. *As to Estates Tail:*—If tenant in tail in possession, or that hath a right of entry, be attainted of *High Treason,* the estate tail is barred, and the land is forfeited; that is to say, forfeited during the life of the tenant in tail, and remains in the Crown, during his life, and during the existence of the heirs of the body of the tenant in tail, and of all such of his collateral heirs as would have been inheritable to the estate tail, if there had been no attainder. But neither the estates in remainder nor the reversion are forfeited by the attainder of the person having the preceding estate tail; unless the reversion be in the Crown, when all is forfeited.

But as the stat. of 26 Hen. 8, c. 13, applies only to *High Treason,* as regards other felonies the stat. *De donis*[a] preserves the inheritance to the issue. On attainder for felony, therefore, other than high treason, an estate tail is forfeited, during the life of the tenant in tail, but not the inheritance: that being preserved to the issue by the statute *De donis. As to Trust Estates:*—By attainder of *cestui que trust,* except, perhaps, for high treason, the trust estate does not escheat.[b] By attainder or conviction of *trustee* for any offence, no forfeiture now takes place; for by 4 & 5 Wm. 4, c. 23, s. 3, it is provided that "no land, chattels, or stock vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to his Majesty, his heirs, or successors, or to any corporation, lord of a manor, or other person, *by reason of the attainder or conviction for any offence* of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his cotrustee, or descend or vest in his representative, as if no such attainder or conviction had taken place."[a] *As to Lands of Copyhold Tenure*:—On attainder for high treason, the offender's estate is forfeited to the lord. On attainder for other felonies his estate is also forfeited to the lord. It is only by the express words of an Act of Parliament that the Crown takes such an estate in preference to the lord.[b] Attainder before admittance works no forfeiture.[c] So a copyhold of inheritance is not forfeited by a conviction for felony without attainder; unless there be a custom to that effect in the manor.[d] Since the 54 Geo. 3, c. 145, (except for high treason, murder, abetting, procuring, and counselling the same,) forfeiture by attainder is confined to the life of the offender. But *Mr. Scriven* is of opinion that the act does not apply to copyholds.[e] *As to Customary-hold or Customary Freeholds*:—These seem to fall under the same rules; whether in cases where the freehold is in the lord, or in the tenant.[f]

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[a] 13 Edw. I.

[b] Cruise, Tit. 30, s. 25.

*As to Gavelkind Lands*:—These do not escheat on attainder.[g]

*As to an Estate by Curtesy*:—This is taken away by attainder.

*Dower* is also barred by an attainder of the husband for *High Treason*.[h] On attainder of the husband for other felonies the widow is entitled to dower: and where offences have been made felony by modern Acts of Parliament, the wife's dower is, in general, expressly saved.[i] If a woman be attainted of high treason or felony, she loses her dower, *except* in gavelkind.[k]

*A jointure* is not barred by the attainder of the husband for treason or felony; but if the widow be attainted of either of these crimes she loses her jointure.[l] Where a man is seized *jure uxoris* and attainted, the issues, during the husband's life, are forfeited.[m]

The interest in lands, purchased or descended after attainder, is forfeited. So a bare right in respect of lands sometimes, as in the case of a disseisee attainted after disseisin, becomes forfeited.[n] Where money is directed to be laid out in the purchase of land, but the quality of the real estate is not imperatively and definitively fixed upon it by the instrument, and it remains *ad arbitrium* whether it is to be considered land or money, it has been held that the Crown has no equity against the next of kin to have it laid out in real estate, in order to claim the escheat.[o] *A Power of Revocation*, unless it be one inseparably annexed to the person of the donee of the power, may be forfeited by an attainder for high treason. When forfeited the power may be executed by the Crown.[p] When the inheritance escheats, and there *is an outstanding term attendant on the inheritance*, the lord by escheat is entitled to it. So the lord by escheat is entitled to all title deeds of the lands escheated, and to such things as partake of the reality, as heirlooms, deer, &c. But as the 54 Geo. 3, c. 145, preserves the *inheritance* to the issue, (except on attainder for high treason, murder, and abetting, procuring, and counselling the same,) it would only apply to the exempted cases.

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[a] Cruise, 447. App. 7, 4. Bac. Ab. Forfeiture.

[b] Ib., Tit. 10, ch. 5, 2; Scriv. p. 1, ch. 13.

[c] Ib. *Roe* v. *Hicks*, 2 Wils. Rep. 13; Lord Kenyon's Rep. 100.

[d] *The King* v. *Willes*, 3 B. & A. 510; Scriv. p. 1, ch. 13, n. 6.

[e] Scriv. p. 1, ch. 13, n.

[f] See Scriv., Tit. c. 1, s. 14.

[g] Rob. Gav. 226; Cruise, Tit. 30, s. 22.

[h] 5 & 6 Edw. 6, c. 11.

[i] Cruise, ch. 4; Tit. 6, s. 3.

[k] Ib. ch. 4; Tit. 6, s. 2.

[l] Ib. ch. 3; Tit. 7, s. 3.

[m] Dalt. ch. 14.

[n] Ib. ch. 14.

[o] Cruise, Tit. 30, s. 29.

[p] Englefield's Ca. 7 Rep. 11; Cruise, Tit. 32, s. 28.

*Incorporeal Property* consists of rights and profits arising from, or annexed to, land. The principal kinds are advowsons, tithes, commons, ways, offices, dignities, franchises, rents, and annuities. On attainder for high treason such property is forfeited.[a] As regards other felonies, the offender's life estate only is forfeited, and his heir, &c., may enter, after his death, as if no attainder had taken place. *Chattels Real and Personal:*—The word chattels comprehends (among other things) leases, issues, and profits of lands and tenements, corn growing, choses in action, specialty and simple contract debts. On attainder, all chattels are forfeited for ever. *Note*, if two be possessed of a chattel, a horse for instance, and one of them be attainted, the Crown takes the whole; and so of a joint obligation; for in such certain chattels the Crown can have no partner.[b]

**Personal property when forfeited.**

**Relation of forfeiture.**

As regards the offender's lands, the forfeiture has relation to the commission of the offence. As regards his chattels, it has relation to his conviction. The person to take upon attainder is the *feudal lord* or his grantee;[c] the Crown, the grantee of the Crown, or the lord of the manor, as the case may be. In general, where the Queen is not feudal lord, she has her *annum diem et vastum* in the estate—a matter the Sheriff must not overlook. The Sheriff should be well advised on matters relating to conveyances, assignments, gifts, &c., made by one indicted or committed for felony. The rule of law is clear, that every conveyance, assignment, or gift, made by such a person, if not *bonâ fide*, is void as against the Crown. If made voluntarily, to anticipate the consequences of a conviction, it would, in general, be void. But circumstances may exist, as an assignment *bonâ fide* made to provide for his defence, for the maintenance of his family, and the like, as to induce a jury (whose province it is to determine the facts) to conclude, that it was not a fraudulent transaction.[d] Whether the Sheriff may or ought to seize felons' property *without office* is often asked. The rule is this—that all *chattels* may be seized at once. They vest *without office* in the Crown, or in the grantee of the Crown, as the case may be. With respect to lands and hereditaments, as the Crown is entitled to them by *matter of record* only, office must be found to divest the felon of them, I mean where the Crown is to have *seisin* of them. Where the Crown is only entitled to the

**Fraudulent assignments, &c.**

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[a] Cruise, Tit. 21, ch. 1, s. 1.

[b] Dalt. ch. 14.

[c] Cruise, Tit. 30, s. 30.

[d] See *Whitaker* v. *Wisbey*, 12 C. B. 58.

profits of such things (as the lands of one outlawed in a personal action) the Sheriff may seize at once. On attainder for high treason he may seize lands without office found.

As regards property *forfeited for crime,* Sheriffs are not, in general, I fear, well advised.

# CHAPTER IV.

## EXECUTION OF WRITS.

I now proceed to consider the Sheriff's duties in and about the *execution of writs*, as contra-distinguished from *writs of execution*—which will be the subject-matter of a following chapter.

## Section I.

### WRIT OF DOWER.

Kinds of.

How affected by 3 & 4 Will. 4, c. 106.

*Dower* is the portion which a widow has, during her widowhood, or for the term of her life, in the lands of her husband, at his decease; for the sustenance of herself and education of her children.[a] Two kinds only now remain:[b] 1. Dower by the common law; 2. Dower by custom.[c] With regard to this provision, the law, until the stat. of 3 & 4 Will. 4, c. 106, was inflexible in the widow's favour, and allowed the husband no right, of his own mere motion, to deprive her of it, or in anywise to restrict it after it had once attached. He may, however, now deprive her wholly of it, by deed of conveyance in his lifetime, or by his will; or he may fetter her right by conditions, restrictions, or directions, by a declaration to that effect in his will, or by a devise of some part of his real estate to her. All or any of these things he may now do, unless precautionary measures have been taken by her to prevent it. Besides, since that statute, all partial estates and interests, and all charges, created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements, to which his land shall be subject, have priority to dower. On the other hand, she is entitled to dower out of an *equitable* estate which she was not entitled to before; and she has other advantages needless to refer to here. Two writs only now remain:—namely, 1. *a writ of right of dower; 2. a writ of dower unde nil habet.*[d]

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[a] 1 Inst. 30.

[b] 3 & 4 Will. 4, c. 106.

[c] Co. Litt. 33. See Gilb. Exec. 209—216, where a most able exposition is given of the law of dower; Perk. Prof. Book, ch. 5, Park on Dower.

[d] 3 & 4 Will. 4, c. 27, s. 36.

### *Writ.*[a]

Victoria &c. to the Sheriff of *W.* greeting: command *A.* that he render to *B.* who was the wife of *C.* her reasonable dower which belongs to her of the freehold which was the aforesaid *C.'s* formerly her husband in the parish of *E.* [*or* "parishes of *E.* and *F.*"] in your county of which she hath nothing as she says: and from which she complains that the said *A.* deforces her and unless * he shall do so and if the said *B.* shall give you security to prosecute her claim then summon by good summoners the said *A.* that he be before our justices of the bench at Westminster on the —— day of —— A.D. 18— to show wherefore he hath not done it and have then the summoners and this writ. Witness &c.

Pledges to prosecute

Summoners

### *Writ of Dower unde nil habet.*

### [*Where Widow has married again.*]

Victoria &c. to the Sheriff of *W.* greeting: command *A.* that he render to *B.* and *Mary* his wife [which said *Mary* was formerly the wife of *E. F.* deceased] the reasonable dower of her the said *Mary* which belongs to her of the freehold which was the aforesaid *E. F.'s* formerly her husband in the parish of —— in your county of which she hath nothing as they say and from which they complain that the said *A.* deforces them and unless &c.

### *Warrant.*

W. to wit. —— Sheriff of *W.* to —— my bailiffs for this time only greeting: By virtue of a writ of dower of our lady the Queen *unde nil habet* to me directed I command you or one of you that you command *A.* that justly and without delay he render to *B.* widow who was the wife of *C.* her reasonable dower [*&c. as in writ*] deforceth her; and unless he shall do it then summon the said *A.* that he be before the justices of our lady the Queen at W. on —— to show wherefore he will not do it; and that after the said summons is made you do on Sunday next after the said summons previously to the commencement of divine service cause to be affixed on or near to the door of all the churches and chapels of the parish of *E.*

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[a] See *William* v. *Gwyn*, 2 Wms. Saund. 43. A writ of dower *unde nil habet* lies only where the widow is endowed of *no part* of her dower. A *writ of right of dower* lies when she is endowed of *parcel* but is deforced of the residue in the same town or vill by the same tenant by whom she was endowed of part, and see 1 Roper, 434; 1 Roscoe, 29; Cruise, Dig. Dower; Booth on Real Actions, 166; Gilb. Exec. Dower; 2 Inst. 262; 9 Vin. Abr. 275. She may have her writ against an heir, alienee, disseisor, &c., or against any one that has power to assign dower. If the lord enter upon the land for an escheat she may bring it against him, but to the Queen she must sue by petition. Co. Litt. 29; 9 Rep. 10; Plowd. 146; Dyer, 268, 107: it is issued from the *Cursitor's* office, Rolls Yard, Chancery Lane. The Court of C. P. has exclusive jurisdiction in all *real* actions. It may be made *returnable* on the third day exclusive before the commencement of each term, or on any day not being Sunday, between that day and the third day exclusive, before the last day of the term, 1 Will. 4, c. 3, s. 2: the Sheriff now returns his writs at once into the Master's office. If the lands lie in *London* the writ of dower is directed to the Lord Mayor and Sheriffs; 1 Rop. 429; F. N. Br. 148. *The writ of right of dower* is not directed to the Sheriff but to the heir, or to his guardian if he be in ward; Gilb. 219, 222. The writ should be brought against *all* the tenants of the freehold, that is, the persons claiming *a freehold interest*, and not mere tenants having a chattel interest; ibid. 346.

a copy of such summons according to the form of the statutes in such case made and provided. Given under the seal of my office this &c.[a]

(*Seal of office.*) —— High Sheriff.

*Summons.*

W. to wit. } By virtue of H.M.'s writ of dower *unde nil habet* to the Sheriff of *W.* directed and by virtue of the said Sheriff's warrant to us directed we do hereby require and command you that you render to *B.* [*&c. as in writ*] as she alleges and complains that you the said *A.* keep her out of the same; and if you refuse so to do then we do hereby summon you that you be and appear before H.M.'s justices of the bench at *W.* on —— to show cause why you do not.

Summons, when made;

The summons must be made in the daytime, between sunrise and sunset.[b] The Sheriff serves or executes this process himself, or sends his bailiff *to the land* with the summoners, there to garnish, cite, or warn the tenant or party, by sticking up a white stick in his land (which is done whether the tenant is there or not). The demandant is not bound to give him notice of the summons.[b]

how;

The summons must be made by, or in the presence of, two or three summoners; for a summons of the tenant must be proved by two or three witnesses. This summons or warning of the defendant, to appear and answer, &c., is so necessary, by the common law, that, without it, all the proceedings are erroneous.[b]

by whom;

The Sheriff *semble* is not a good summoner, "*Femes, ne Sheriffs, ne enfants, ne ul que ce est freehold tenant, poent estre bon summoners.*"[b]

where made.

If the defendant be not tenant of the land, the summons must be made *in terrâ petitâ;* for the writ commands the Sheriff, not to summon the tenant upon his own land, but *generally* that he shall summon him, not naming on what land; and, then, by a maxim of law, it is taken, that he shall summon him on the land in demand.[b] So where it is against the heir, it must be made on land descended, because it is the *terra petita* or land in demand. If tenant appears, however, it is not material on what land he is summoned. It is said that a summons *personally* made on the defendant is sufficient, without a summons on the land; or without affixing a copy of the summons on the church or chapel doors.[c]

Proclamation of summons.

By the statute of 31 Eliz. c. 3, s. 2, it was enacted, "that after every summons upon the land, in any real action, fourteen days, at the least, before the day of the return thereof,[d] *proclamation of the summons* shall be made, on a Sunday, in form aforesaid, at, or near to, the most *usual door of the church or chapel* of that town or parish where the land, whereupon the summons was made, doth lie; and that proclamation so made as aforesaid shall be returned, together with the names of the summoners; and, if such summons shall not be proclaimed and returned according to the tenor and meaning of this act, then no *grand cape* to be awarded, but *alias* and *pluries*

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[a] The 31 Eliz. c. 3, is abrogated by 7 Will. 4, and 1 Vict. c. 45, as to proclamations at the church door.

[b] Dalt. ch. 31.

[c] Dalt. ch. 31; but see 1 Roper, 430.

[d] Hence it follows that the summons and proclamation must be at least *fourteen* days before the return of the writ.

### *Return of Nihil.*

By virtue &c. and I further certify that the said *A.* hath no lands which I can take by the view of &c. The answer of ——.

The execution of this writ appears in a certain schedule hereto annexed.

The answer of —— High Sheriff.[a]

### *Writ of Inquiry and Seisin.*[b]

Victoria &c. to the Sheriff of *W.* greeting: Whereas *B.* widow who was the wife of *C.* lately in our Court before our justices of the bench at W. recovered her seisin against *A.* of the third part of &c. with the appurtenances in the parish of *E.* in your county as her dower of the endowment of the said *C.* her late husband by our writ of dower whereof she has nothing as by the record and process thereof now remaining in our said Court appears to us of record; therefore we command you that without delay you cause the said *B.* to have her full seisin of the said third part with the appurtenances to hold to her in severalty by metes and bounds and how you shall have executed this writ make known to our said justices at W. on &c. We command you also that by the oath of twelve good and lawful men of your bailiwick you diligently inquire if the said *C.* the late husband of the said *B.* died seised of or had a right to[c] the said tenements with the appurtenances in fee simple or fee tail at law or in equity and if by that inquisition you shall have so found that you diligently inquire how long time has elapsed from the death of the said *C.* and how much the said tenements with the appurtenances are worth by the year in all issues beyond reprises, according to their value; and what damages the said *B.* hath sustained as well as by occasion of the detention of her said dower beyond the said value as for her costs and charges by her about her suit in this behalf expended and the inquisition thereupon made make known to our said justices at the said time under your seal and the seals of those by whose oath you shall have made that inquisition and this writ. Witness &c.

### *Return.*

W. to wit. } An inquisition taken at —— in the said county the —— day of —— between the hours of ten and twelve of the clock in the forenoon of the same day in the year of our Lord 18— before me —— Sheriff of the said county by virtue of her Majesty's writ to me directed upon the oaths of twelve good and lawful men of my bailiwick and being then and there sworn and charged upon their oath say that *C.* in the said writ named died *seised of*[d] &c. with the appurtenances at *E.* in the parish of *E.* in the said county in his demesne as of *fee simple* and that the tenements aforesaid with the appurtenances are worth by the year beyond reprises according to the true value of the same the sum of £ —— and that —— years and —— months are elapsed from the death of the said *C.* and that *B.* his widow in the same writ named hath sustained damage by reason of the detaining her dower in the said writ specified to the value of £ —— and for costs and charges by her about her suit in that behalf expended the sum of 40*s.* In testimony whereof as well I the said

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[a] If the Sheriff do not return the writ, the demandant may sue out an *alias grand cape* at the return of the first writ; see Entry, Rastall, 239 a, pl. 4. If the defendant appear on the summons or on the *grand cape*, and the default of appearance upon the summons has been released to the defendant, the demandant must count; see 3 Chitty, Pl. 1218; Doctr. Plac. 147; 2 Wms. Saund. 43. If on the return of the *grand cape* the tenant makes default, and the demandant insists upon the default, he is entitled to judgment of seisin and to an award of a writ of inquiry, but the demandant *may* waive the default and take an appearance upon the *grand cape*.

[b] No *alias* habere facias seisinam can issue; for in Dyer, 278 a, Anon., the Sheriff assigned dower by metes and bounds, but the demandant refused to receive it; held, a good return, and that the widow might enter at any time after without an *alias*.

[c] 3 & 4 Will. c. 105, ss. 2, 3.

[d] "*Seised of*," or "had a right to" (as the case may be).

Sheriff as the jurors aforesaid have interchangeably put our seals to this inquisition the day and place above written.

The answer of —— High Sheriff.

And I do further certify to the justices of our lady the Queen at W. that by virtue of the said writ I did on &c. cause the said *B.* to have full *seisin* of the third part of the &c. with the appurtenances to wit of &c. in the tenure of *A.* to hold to the said *B.* in severalty by metes and bounds as the dower of the said *B.* of the endowment of the said *C.* her late husband, as by the said writ I am commanded. The residue of the execution of this writ appears in the inquisition hereunto annexed.

The answer of —— High Sheriff.

Assignment, how made.

The assignment of dower, being a *judicial* act, must, like all other judicial acts, be done by the Sheriff in person, and not by deputy.[a] He can only assign dower according to the rule of the common law, and the tenor of the writ.[b] When, according to the exigencies of the writ, the whole, as in *gavelkind*, is to be seized, no difficulty can well arise in executing it; but when a part only is to be seized, and that part incapable of a *beneficial* severance, as in mines, tolls, and the like, the assignment of dower is frequently beset with many difficulties. The general rule is, that if the thing, of which she is endowed, be divisible, her dower must be set out by metes and bounds;[c] but if it be, in its nature, indivisible, she must be endowed specially; as of the third presentation to a church, the third part of an advowson, the third toll dish of a mill, or "*de integro molendino per quemlibet 3 mensem*;"[d] the third part of the profits of an office; the third part of a piscary, viz. *tertium piscem vel jactum retis tertium;* and so of a rent charge and common of pasture, that is, a stinted pasture.[d] The judgment, in *Stoughton* v. *Leigh*,[e] throws considerable light on the mode of executing this writ, especially where the subject-matter is incapable of a *beneficial* severance. It was a case directed out of the High Court of Chancery for the opinion of the Court of C. P., and the *main* features of it were these:—*John Hanbury* died seised of divers landed estates, and of several mines and strata of lead and coal—some of these mines being under his *own* land—others under land not his own; some of them opened, others not opened. The *certificate*, after stating that the widow was not dowable of any of the mines or strata which had not been opened at all, whether in lease or not, proceeds to say, that "in assigning the dower of *Mr. H.'s own lands* the Sheriff must estimate the annual value of the open mines therein as part of the value of the estates of which the widow is dowable; but it was not absolutely necessary that he should assign to her any of the open mines themselves, or any portion of them. The third part in value which he should assign to her might consist wholly of land set out by metes and bounds, and containing none of the open mines. *Or*, he might include any of the mines themselves in the assignment to the widow, describing them specifically, if the particular lands in which they lie should not also be assigned; but if those lands should be included in the assignment, the open mines within them might, but were not necessarily to be so described, being part of the land itself which was assigned: and as the working of open mines was not waste, the tenant in dower might work such mines for her own exclusive profit. *Or*, the Sheriff might divide the enjoyment and perception of the profits of any of the particular mines as after mentioned. In regard to the mines and strata which *Mr. H. had in the lands of other persons*, they were of opinion that it was not necessary that the Sheriff should divide each of the mines or strata; but he might assign such a number of them as might amount to one-third in value of the whole, or he might proportion the enjoyment of such of them as he should think necessary, so as to give each a proper share of the whole. If the division of an open mine could be made by metes and bounds as lands are required to be divided, without preventing the parties from having the proper enjoyment and perception of the profits, they thought that mode should be adopted; but as the property seemed to them to be incapable of a beneficial severance in that way, they thought the case analogous to some of those stated by Lord Coke, 1 Inst. 32 a, wherein it is held that the Sheriff may make the assignment in a special manner, and that therefore he might proceed with respect to the mines in question. They found no authority however establishing any precise mode of dividing a mine, nor could they point out any that might not be attended with inconvenience; but if the Sheriff was to make the assignment, they thought he might lawfully execute his duty by directing separate alternate enjoyment of the whole for short periods, proportioned to the share each had in the subject, or by giving the widow a proportion of the profits. In answer to the last question proposed to them, they were of opinion that the widow was entitled to work for her own exclusive use the open mines within the close that had been assigned to her, without any exception of the mine, for her dower of one of the estates, notwithstanding the excess arising from the omission of such exception; and inasmuch as the assignment was the *act of the heir himself*, being of full age at the time, they thought he had no remedy at law against the dowress for avoiding the consequences of that act. Had he been under age at the time he might have had relief by writ of admeasurement of dower; or had the assignment been made by the Sheriff in execution of a judgment in dower, the heir might have had a *scire facias* to obtain an assignment *de novo*." The Sheriff may put the widow into possession or seisin, by a clod, or by grass growing upon the land, or by any beast being upon the land;[a] or he may assign it by parol.[b]

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[a] *Bandal's ca.* Noy. 21.

[b] 1 Roll. Abr. 683, pl. 35; see also 1 Roper on Husband and Wife, where the matter is ably treated.

[c] Hence it follows that the endowment must be *parcel of the lands themselves.*

[d] Co. Litt. 32.

[e] 1 Taunt. Rep. 402; and see *Doe* d. *Riddell* v. *Gwinnell*, 1 G. & D. 191.

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[a] Fitz. Dower, 38.

[b] Co. Litt. 35; *Rowe* v. *Power*, 2 N. R. 1, 34; Watk. on Conv. 83.

If the commands of the writ be to deliver possession of a third part of all lands and tenements, &c., and there are lands in meadow, pasture, and corn, he may assign the whole dower out of any of them.[a] Although the Sheriff do not return the writ, the widow is lawfully seised in dower.[b] It is not necessary for him to state in his return the *particular* fields which he has assigned; it is sufficient to state, with certainty, of what such thirds consist.[c] The Sheriff's mistake, in assigning it, may be corrected by *scire facias* for an assignment *de novo* by the heir or tenant;[d] *semble*, a Court of Equity would relieve.[e] For any misconduct, in assigning dower, the Court will punish the Sheriff[f]—in the case cited he was committed to prison.

**Certainty of return.**

**Excessive assignment.**

**Sheriff's misconduct.**

## SECTION II.

### QUARE IMPEDIT.[g]

THIS is the proper process to try the right to a presentation. By the common law there were three writs for the church itself:—1. Right of advowson. 2. Assize of darrein presentment. 3. Quare impedit. The two former have been abolished.[h] Quare impedit is, in strictness, a *mixed* and not a *real* action. But it is not an action over which the three Superior Courts have a concurrent jurisdiction; so that *The Common Law Procedure Act* (15 & 16 Vict. c. 76) does not apply to it, nor do the general rules of Hil. T. 1853.[i] It is a *possessory* writ, and lies, for the patron of an advowson, to restore him to the possession of his advowson, and to his right of presentation.

**For whom and when it lies.**

At common law, it lay only when the patron was hindered from presenting during the vacancy of the church, *plenarty* being in all cases a good plea. But since the 13 Edw. 1, c. 5, *plenarty* by defendant's own presentation is no plea, "so that the writ be purchased within the six months, though he cannot recover his presentation within the six months." A patron is said to be disturbed in presenting, either when the bishop hath admitted and instituted a clerk upon the presentment of another pretended patron, or, when the bishop will not admit the patron's clerk presented him, upon any pretence. But, if the ordinary hath filled the church, by a wrongful collation, the patron is not thereby disturbed; and, in such a case, the patron must present, and the ordinary refuse to admit his clerk, before the patron can bring his action; neither is

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[a] Moore, 19 pl. 66.

[b] *Ashborough's ca.* Cro. Eliz. 43.

[c] *Howard* v. *Cavendish*, Cro. Jac. 621; Palm. 264.

[d] 1 Roper, 406; Gilb. Exc. "*Dower*," 389.

[e] *Hoby* v. *Hoby*, 1 Vern. 218: 1 Roper, *suprà; Sneyd* v. *Sneyd*, 1 Atk. 442.

[f] *Howard* v. *Cavendish*, *suprà; Longville's ca.* 1 Keb. 743.

[g] 2 Inst. 357; 2 Roll. Abr. 375.

[h] 3 & 4 Will. 4, c. 27, s. 36.

[i] *Miller* v. *Miller*, 1 Scott, 387; *Tolson* v. *Bishop of Carlisle*, 3 C. B. 50.

Statute of limitation.

For what the writ lies.

For whom.

Parties to suit.

there a disturbance by a stranger presenting a clerk, unless the bishop hath admitted him: but, if admitted, the disturbance is complete; and the patron may bring his action, without making any presentment to the bishop.[a] Before the stat. of 7 Anne, c. 18, an usurpation of a presentation did, at common law, displace the right of advowson, and no possessory action could be brought; but, since then, no usurper or disturber could divest the right of presentation out of the true patron, or acquire the inheritance of the advowson by wrong; the provisions of which did, in effect, take away all limitation of suit about the right, and enable the true patron to present, at any time, on the church becoming vacant, or, if disturbed, might have had his *quare impedit.*[b] But, upon the recommendation of the real property commissioners, a statutory limitation is now fixed, by the 3 & 4 Will. 4, c. 27, ss. 29–34. A patron may have this writ for a church, chapel,[c] vicarage, prebend.[d] So the writ lies for a donative deanery by the Queen, though elective;[e] or an archdeaconry (but not for a chancellorship or commissaryship, for they are mere offices, although granted for life). So it lies for a bishop disturbed; for the Queen disturbed;[f] for the grantee of an advowson against the [patron] grantor;[g] for executors on their disturbance, or on the disturbance of their testator;[h] for husband and wife jointly, or for the husband alone *jure uxoris;* if he die, the wife may sue alone on that disturbance;[i] for a claimant under a recovery;[k] for a parson patron of a vicarage;[l] and for the chapter in respect of their possession against the dean. If one have the right of nomination and another the right of presentation, and one of them impede the other, it will lie.[m] If a stranger present, the two may join.[n] Tenants in common and joint tenants must join;[o] likewise coparceners, when there has been no composition to present in turn.[p] An heir cannot have this writ, for a disturbance in his ancestor's lifetime, unless the church be donative.[q] The plaintiff (the action being *possessory*) must have an immediate right of presentation; a reversion or remainder will not do. It is, generally, advisable, to bring it against the bishop, the pretended patron, and his clerk;[a] for, if the bishop be not made a party to the suit, and the suit be not determined, until six months are past, the bishop may present by lapse; whereas, if he be made a party, no lapse can accrue, until the right be determined. Again, if the pretended patron be not made a party, the suit is of none effect, and the writ shall abate; for the right of the patron is the principal question in the cause.[b] Again, if the clerk be not made a party, and he have received institution before action brought, the right of patronage may be recovered, but not the present turn; for he cannot have judgment to remove the clerk, unless he be a party.[c]

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[a] See *Reg.* v. *Chapter of Exeter*, 12 Ad. & E. 512; Watson's Cl. Law, 238; Hob. 200.

[b] See also Plowd. Rep. 358, 370; Shelford's Real Prop. Stat. p. 10, and cases there cited.

[c] *Bedford* v. *Lincoln*, 2 Willes, 611; 14 Hen. 4, c. 6.

[d] 13 Edw. 1, c. 5; *Smalwood* v. *Bishop of Lichfield*, 1 Leon. 205; Owen, 99.

[e] Co. Litt. 344.

[f] Bull. N. P. 125 (*a*) n.; Watson's Cl. Law, 240; Co. Litt. 344.

[g] 2 Roll. Abr. 375.

[h] 1 Wms. Exors. 671, 748.

[i] 1 Wms. Exors. 744.

[k] 7 Hen. 8, c. 4.

[l] F. N. Br. 34.

[m] 3 T. R. 651.

[n] Dyer, 48, a.

[o] Br. Abr. (Joinder in Action), 103; Co. Litt. 197 b; Wats. C. L. 254. Where there has been a partition, see 7 Anne, c. 18.

[p] 2 Inst. 365; 1 Hen. Bl. 417; see 13 Edw. 1, c. 5, s. 5.

[q] 1 Roscoe on Real Actions, 101; 2 Wils. Rep. 150. *A donative* benefice, be it remembered, descends to the heir at law, a *presentation* to the executor.

### *Writ.*

Victoria, &c. To the Sheriff of *W.* greeting: Command —— bishop of *L. A.* Esq. and *C.* clerk that justly and without delay they permit *X.* to present a fit person to the church of *M.* which is void and in the gift of the said *X.* as he saith; and whereof he complaineth that the aforesaid bishop *A.* and *C.* unjustly hinder him; and unless they shall so do and the said *X.* shall give you security to prosecute his suit then summon by good summoners the said bishop *A.* and *C.* that they be before our justices at Westminster on &c. to show why they will not do it and have you then the summoners and this writ. Witness, &c.

### *Warrant.*

W. (to wit.) —— Sheriff of the county aforesaid to —— and —— my bailiffs greeting: By virtue of her Majesty's writ of *quare impedit* under the great seal of Great Britain to me directed I command you or one of you that you command —— bishop of *L. A.* Esq. and *C.* clerk that justly and without delay they permit *X.* to present a fit person to the church of *M.* which is void and in the gift of the said *X.* as he saith; and whereof he complaineth that the aforesaid bishop *A.* and *C.* unjustly hinder him: and unless they shall so do then I command you that you summon by good summoners the said bishop *A.* and *C.* that they be before her Majesty's justices at W. on &c. to show why they will not do it. Given under the seal of my office this —— day of —— 18—.

[*Seal of office.*] By the Sheriff.

### *Summons.*[d]

By virtue of her Majesty's writ of *quare impedit* under the great seal of Great Britain to the Sheriff of the county of *W.* directed and by virtue of the said Sheriff's warrant thereupon to us directed we do hereby require and command you —— bishop of *L. A.* Esq. and *C.* clerk that ye justly and without delay permit *X.* to present a fit person to the church of *M.* which is void and in the gift of the said *X.* as he saith and whereof he complaineth that ye the said bishop *A.* and *C.* unjustly hinder him: and unless ye shall so do then we do hereby summon you that ye be before her Majesty's justices at Westminster on &c. to show cause why ye will not do it. Given &c.

To the Right Rev. Father in God ——
Lord Bishop of *L. A.* Esq. and *C.*
Clerk and each and every of them.

*J. B.*
*T. S.* } Bailiffs.

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[a] As to *parties*, see further in Com. Dig. Pleader; Sell. Pr. vol. ii. 321; Lee's Pr. Dict. "*Quare impedit;*" Watson's C. L. 264.

[b] Hob. 138, 164, 200, 316; 7 Rep. 25.

[c] As to *damages*, see 13 Edw. 1, c. 5. *Costs*, 4 & 5 Wm. 4, c. 39. Bull, N.P. 123.

[d] The summons may be made in the church or to the person.

### *Return.*

Pledges to prosecute { *John Doe.* *Richard Roe.*
Summoners { *J. B.* *T. S.*

By virtue of this writ to me directed I have summoned the within-named bishop *A.* and *C.* that justly and without delay they permit the within named *X.* to present a fit person to the church within-mentioned: and I have also summoned by the good summoners above-named the said bishop *A.* and *C.* that they be before her Majesty's justices at *W.* on &c. to show why they will not do it as by this writ I am commanded.
The answer of —— High Sheriff.

### *Pone.*[a]

Victoria &c. to the Sheriff of *W.* greeting: We command you that you put by sureties and safe pledges *A.* Esq. and *C.* clerk that they be before our justices at Westminster on &c. to answer us of a plea that they permit *X.* to present a fit person to the church of *M.* which is void and in the gift of the said *X.* and whereof the said *A.* and *C.* together with —— bishop of L. unjustly hinder the said *X.*; and to show wherefore they were not together with the said bishop in our court before our justices at Westminster on a certain day now past as they have been summoned: and have you there the names of the pledges and this writ. Witness &c.

### *Return indorsed on the Pone.*

The answer of —— Sheriff of the county of *W.*
Summoners of the within-named *A.* and *C.* are { *J. B.* *H. B.*
Pledges are { *John Doe.* *Richard Roe.*
—— Esq. High Sheriff.

## SECTION III.

## HABEAS CORPUS.

THE great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention; *ad faciendum, subjiciendum, recipiendum;* to do, submit to, and receive whatsoever the judge or Court awarding such writ shall consider in that behalf.[b] It is a Common Law writ, secured by several Acts of Parliament, of which the most important are the 16 Car. 1, c. 10; the 31 Car. 2, c. 2 (pre-eminently known as *The Habeas Corpus Act*); and the 56 Geo. 3, c. 100. The Court of Chancery, and any of the Common Law Courts at Westminster, or any Judge thereof, may award it, either in term or in vacation.[c]

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[a] Issued after the return of the *quare impedit.* The Sheriff's warrant upon the *pone* may easily be framed from other precedents and the writ (*ending as in writ*), "and to show wherefore they were not together with the said bishop in her Majesty's Court," &c.

[b] Bl. Comm. b. 3, ch. 82; Inst. 55, 615; 4 Ib. 182; 4 Bac. Abr. *Habeas Corpus, Watson's ca.* 9 A. & E. 780. Wilmot's opinions, p. 81.

[c] *Watson's case, suprà; Carus Wilson's case*, 7 Q. B. 984.

A party imprisoned has also a right to the opinion of every Court as to the propriety of his detention.[a] It is a writ claimable of right, but it does not issue of course. Whether at common law, or on the stat. of 31 Car. 2, c. 2; or 56 Geo. 3, c. 100, the application must be grounded on *an affidavit of a probable and reasonable ground* for the complaint, and that it is made *by or on the behalf of the person imprisoned;*[b] and there must be an affidavit, if possible, from the prisoner.[c] The application must also be preceded by *his written request*, attested by two witnesses.[d]

## *Habeas Corpus (Q. B.).*[e]

Victoria &c. to the Sheriff of *W.* greeting: We command you that you have the body of *C. D.* detained in our prison under your custody as it is said under safe and secure conduct together with the day and cause of his being taken and detained by whatsoever name he may be called or known before our right trusty and well beloved—(*as the case may be*) our chief justice assigned to hold pleas in our Court before us at his chambers in Rolls' Gardens Chancery Lane London immediately after the receipt of this writ to do submit to and receive all and singular those things which our said chief justice shall then and there consider of him in this behalf; and have there then this writ. Witness &c.

## *Warrant.*

C. to wit. } —— High Sheriff of the said county to —— keeper of H.M.'s gaol in and for the said county by virtue of H.M.'s writ to me directed I command you that you have the body of —— before —— Ch. J. of our lady the Queen before the Queen herself at his chambers in Rolls' Gardens Chancery Lane London immediately after the receipt of this your warrant to do submit to and receive what the Queen's Ch. J. shall then and there consider of him in this behalf. Hereof fail not at your peril. Given, &c.

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[a] Ex parte *Partington*, 13 M. & W. 684; *Canadian prisoner's case*, 9 Ad. & E. 731; 5 M. & W. 32, S. C.

[b] In *criminal cases* a copy of the commitment, or an affidavit of the refusal of it, must be laid before the Court or judge; Tidd's Pr. 347; and the application should be supported by other evidence than the affidavit of the prisoner; 1 Leach, 255.

[c] *Canadian pris. ca.*, 5 M. & W. 35.

[d] *Rex* v. *Wiseman*, 2 Smith's Rep. 617. It is usual to obtain at the same time a *writ of certiorari* from the Crown Office to the committing magistrate, requiring him to return the depositions, &c.

[e] The writ (under 31 Car. 2, c. 2) must be marked thus: "*per statutum tricesimo primo Caroli secundi regis.*" It may be directed and run into a county palatine, cinque ports, or other privileged places in England, Wales, Berwick-upon-Tweed, Jersey, (7 Q. B. 986,) Guernsey or Man, *Crawford's case*, 13 Q. B. 613, or "into any port, harbour, road, creek or bay upon the coast of England or Wales, although the same should be out of the body of any county." When the prisoner is in custody for a criminal matter, and the writ be granted by a judge of Q. B., it must issue from the crown side of the Court; *Easton's case*, 12 Ad. & E. 645. It may be made returnable *immediately*, which means within due and convenient time; *Bettesworth* v. *Bell*, 3 Burr. Rep. 1876. It must be signed with the proper hands of the Chief Justice, or, in his absence, of one of the Justices of the Court out of which the same writ shall be awarded or made; 1 & 2 Ph. & M. c. 13, s. 7; *vide* Salk. Rep. 150; 2 Str. Rep. 895; 12 Mod. 2; 2 Lord Raym. 1379; if not so signed the Sheriff is not bound to execute it; *Rex* v. *Roddam*, Cowp. 672. See also *Shepherd* v. *Shum*, 2 Cr. & J. 632. If the Sheriff do not obey the *first* writ in convenient time, he will not only be subject to the penalties in the 31 Car. 2, but, after being ruled to return it, to an attachment for his contempt, such mode of punishment being within the spirit of the statute referred to; *Rex* v. *Wright*, 2 Str. Rep. 915; *Rex* v. *Winton*, 5 Term. Rep. 89. The writ, within three days after service, must be returned, and the body brought, if within twenty miles; if beyond the distance of twenty miles and not above one hundred, then within the space of ten days; if beyond the distance of one hundred miles, then within the space of twenty days; 32 Car. 2, c. 2, s. 2.

By the same Sheriff.

### *Return.*[a]

C. } to wit. } I —— High Sheriff of the said county do humbly certify and return to the Rt. Honble. —— H.M.'s Ch. J. in the writ to this schedule annexed that before the said writ came to me (that is to say) on the —— day of —— in the year within written *C. D.* in the said writ named was taken and in H.M.'s gaol for the said county under my custody is detained by virtue of a certain warrant of commitment [*or* "a writ of *capias ad satisfaciendum*"] which said warrant [*or* "writ"] follows in these words: Victoria &c. [*here set forth the writ and all indorsements verbatim, and conclude thus:*] and these are the causes of the taking and detaining the said *C. D.* which together with his body I have ready as by the said writ I am commanded.

### *Indorsement.*

The execution of this writ appears in the schedule hereunto annexed.

The answer of —— Esq. High Sheriff.

## SECTION IV.

### ACCEDAS AD CURIAM.

THIS writ lies for the removal of a plaint out of the Court of a franchise, hundred, Court Baron, or the like (not being Court of record).

It is *issued* out of Chancery; and is executed, by directing a precept, in the form set forth in the text, to the steward and suitors of the Court; commanding them to return the plaint to the Sheriff; and to prefix a day to the parties to appear; and, thereupon, the Sheriff returns the *accedas ad curiam* with the plaint, &c. annexed.[b]

The writ cannot be had without showing some special cause for the removing of it; as that a *freehold* is in question there; or some foreign plea pleaded not triable in that Court.[c]

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[a] If the facts be substantially stated it is enough. *Watson's ca.*, 9 Ad. & E. 787. It is a good return that the party is dead. Dalt. 219, 251. He may return *cepi* and *languidus;* ibid. 250. He cannot return that he was resisted, for he may raise the *posse comitatus.* The return may be amended before or after filing, 9 Ad. & E. 731. The return need not be supported by affidavit. It seems that it may be impeached and the truth inquired into; see *Ex parte Beeching*, 4 B. & C. 136; 55 Geo. 3, c. 100, s. 4; *Watson's case*, 9 Ad. & E. 781. *In re Hakewill*, 12 C. B. 228; *sed vide Reg. v. Dunn*, 12 Ad. & E. 599; *In re Clarke*, 6 Jur. 757, Q. B.; but whether by affidavit or pleading does not seem quite clear. Time for return, *ante*, 123, n (e). In executing this writ the officer should not deviate from the direct road nor allow his prisoner to go at liberty; if he do it will amount to an escape; Roll. Abr. *Escape*, D. 9.

[b] Greenwood, 61; Fitz. Nat. Brev. 71; Plowd. 74; Archb. Pr. 989.

[c] Ibid.

Victoria &c. to the Sheriff of *W.* greeting: We command you that taking with you four discreet and lawful freeholders of your county you go in person to the Court of —— and in Court there you cause the plaint, to be recorded which is in that Court without our writ brought by the said —— against the said —— as it is said; and that you have that record before our justices at Westminster on —— under your seal and the seals of four lawful freeholders of the same county of such as shall be present at that recording; and prefix the same day to the parties aforesaid that then they may be there to proceed in the same plaint as shall be just; and have there the names of the said four freeholders and this writ. Witness &c.

### *Return.*[a]

W. to wit. } Court Baron of —— lord of the manor of —— in the said county holden at —— in and for the said manor on the —— day of —— 18— before —— steward of the said Court.

*A. B.* complains of *C. D.* &c. (*Pleadings.*)

*J. H.*, Steward.
*D.*, *E.*, *F.*, *G.* } Suitors.

By virtue of this writ to me directed I did go to the Court within written and in full Court there I caused to be recorded the plaint within written which record I have (as appears in the schedule to this writ annexed) before —— on the day and at the place within contained, under my seal and the seals of *D.*, *E.*, *F.* and *G.* four lawful freeholders of my county who in the same Court were present at that recording and I prefixed the same day to the parties aforesaid that then they might be there to proceed in the same plaint as was just as within I am commanded.

The answer of —— High Sheriff.

## SECTION V.

## DE VENTRE INSPICIENDO.

"THIS writ is granted out of Chancery, commanding the Sheriff, that he cause the party to be viewed by 12 knights, and searched by 12 women in the presence of the 12 knights, and *ad tractandum per ubera et ventrem inspiciend.* whether she was with child, and to certify the same unto the common bench: and if she were with child, to certify for how long time in their judgments, *et quando sit paritura:* Whereupon the Sheriff caused her to be searched, and returned, that she was 20 weeks gone with child, and that within 20 weeks *fuit paritura;* whereupon another writ issued out of the C. B., commanding the Sheriff safely to keep her in such an house, and that the doors should be well guarded, and that every day he should cause her to be viewed by some of the women named in the writ (wherein ten were named), and when she should be delivered, that some of them should be with her to view the birth, whether it be male or female, to the intent there should not be any falsity; and upon this writ the Sheriff returned, that accordingly he had caused her to be kept, &c., and that such a day, &c., she was delivered of a daughter.[a] So likewise the like writ was afterwards directed to the Sheriffs of London, to cause one M. to be searched, whether she was with child by her deceased husband, *et quando fuit paritura,* (no mention being made of her second marriage,) and this writ was according to the precedent in the 39 Eliz. of the like writ against the said Lady W.; and this writ was returnable in the C. B.: the Sheriff returned the inquisition, that by such persons he caused her to be searched, and found her to be enseint, et quod fuit paritura within twenty weeks; wherefore he now prayed a second writ out of this Court, to be directed to the Sheriff of S., because she was removed with her husband to W. in S., and there inhabited, that the Sheriff might take her into his custody, and keep her until she was delivered of her child, that there might not appear to be any false or supposititious birth; and that in the interim he should cause her to be viewed every day by certain matrons, named by the Court in the writ, and that some of them should be at the birth of the child, according to the said precedent of the Lady W.; but because in that case the lady was a widow, and so such a course might well be observed; but here she is a feme covert, who ought to habit with her husband, they would not take such a course with her, but left her with her husband, he entering into a recognizance, that she should not remove from the house wherein they then inhabited, and that one or two of the women returned by the Sheriff should see her every day, and that two or three of them should be present at her travail; for it was said, that this issue might well be said to be the child of the first husband, and should inherit his land, so as if there were any false or supposititious birth, the cousin and heir might be disinherited: Wherefore a writ was accordingly awarded to the Sheriff of S., to cause her to be seen every day until her delivery, by two at least of the said women returned by him, and that three of them or more should be present with her at her delivery, so as no falsehood might be in the birth. *Note*, after this course observed she was delivered of a female child, who was afterwards, by inquisition, found to be the daughter and heir of the said William T. deceased."[b]

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[a] It is a good return, that after the receipt of the writ, and before the return thereof, no Court was held; and that he also required the lord to hold his Court, which he refused to do. Greenwood, 63; Fitz. *Return*, 21; Dalt. 243. The persons who go with him need not be knights; Fitz. Nat. Br. 10; Green. 63. It seems also to be a good return, that the suitors refused to record the plea, or to deliver to him the record, or denied that there was any such record; in such cases, the Court above would award a *distringas* directed to the Sheriff against the suitors, with a summons against the party; Dalt. 243.

## SECTION VI.

### DE LUNATICO INQUIRENDO.[c]

THIS is a proceeding, in the nature of a writ of inquiry, into the *soundness* of an individual's mind (of his competency to manage his own affairs), and at what time the affliction first disabled him;[a] or, in some cases, merely to inquire into a man's competency to manage his own affairs, as in the case of trustees and mortgagees.[b]

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[a] *Willoughby's case,* Cro. El. 556; Dalt. c. 4, s. 2, app.

[b] *Theaker's case,* Cro. Jac. 686; Dalt. c. 4, s. 2, app.

[c] See 8 & 9 Vict. c. 100; 16 & 17 Vict. cc. 70, 96.

The Sheriff acts *ministerially* to the Master in Lunacy. The petition to the Lord Chancellor states the party's incapacity, and prays for an inquiry; it is accompanied by affidavits of the unsoundness of the person's mind and incompetency to manage his own affairs; whereupon an inquiry is ordered, and the Master in Lunacy, where it is to be tried by a jury, issues his precept to the Sheriff of the county, where the party resides, directing him to summon a given number of men. The number is regulated by a general order of the Lord Chancellor.[c] The inquisition must be found by the oaths of twelve men.[c]

### *Precept to Sheriff.*[d]

By virtue of a commission under the Great Seal [or "order" *as the case may be*] bearing date the —— day of —— last to me whose name is hereunder written directed I do will and require you to cause to come and appear before me *twenty-four* &c. on &c. at &c. then and there upon oath to inquire of the lunacy of one *T. H.* and of all such other matters and things as shall be then and there given them in charge; and hereof fail not at your peril.

To the Sheriff of *W.*

*A. B.*
(Master in Lunacy.)

### *Indorsement on Precept.*

The execution of this precept appears in a certain panel hereunto annexed.

The answer of —— High Sheriff.

### *Panel.*

W. to wit. } The names of the jurors to inquire according to the tenor of the precept hereunto annexed.

*A.*
*B.*
*C.*

### *Oath*[e] *to Foreman.*

You shall well and truly inquire of all such matters and things as shall be given you in charge on this inquest, and a true verdict give according to the evidence.

So help you God.

### *Oath to the other Jurors.*

The same oath that your foreman hath taken on his part you and each of you shall well and truly observe and keep on your parts.

So help you God.

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[a] The term *soundness* of mind seems to have been introduced by Lord Eldon. See Beck's Med. Jur. *Mental Aberration*, s. 3 (7th edit.).

[b] See 6 Geo. 4, c. 74.

[c] 16 & 17 Vict. c. 70, s. 46.

[d] See Highmore and Shelford on Lunacy.

[e] The Master in Lunacy has power to administer oaths, &c., 16 & 17 Vict. c. 70, s. 56.

Return of commission. The Master in Lunacy, and not the Sheriff, returns the Commission. It is signed by the jury and the Master in Lunacy.

## SECTION VII.

### NE EXEAT REGNO.

THIS writ was, originally, a state writ; but, towards the latter end of the reign of *James* the First; it was granted, not only in respect of attempts prejudicial to the state, but, in other cases, in aid of subjects.[a]

*The Absconding Debtors Act*, 1851 (14 & 15 Vict. c. 52) has, practically, reduced it again to its former limits. The plaintiff must be within the jurisdiction.[b] For what. It issues when the demand is for a *certain equitable money demand*.[c] For a balance of *account*, however, although he might be held to bail *at law*, yet a *ne exeat regno* may still issue: for the Court of Chancery, in such a case, has a concurrent jurisdiction with a Court of common law. It does not lie in respect of costs taxed in a chancery suit,[d] nor for alimony after a decree in the Ecclesiastical Court pending an appeal from that decree.[e] It issues to restrain a person from going to *Scotland*[f] or *Ireland*.[g] How obtained. The mode of obtaining this writ is, by filing a bill (it must be *after* the filing of the bill,[h] containing a prayer for the writ); and then moving, upon affidavit, for the writ.[i] The affidavit in support of the motion must be as positive as an affidavit to hold to bail. Information and belief is not sufficient, except upon matter of pure *account*, as between partners and executors.[k] The application ought to be as prompt as possible.[l]

### *Writ.*[m]

The Queen to the Sheriff of *W.* greeting: because we are given to understand that *A. B.* purposes to go over towards foreign parts to prosecute there many things prejudicial and hurtful to us and many of our people: we willing to resist his malice in this behalf command you firmly enjoining that you cause the aforesaid *A. B.* to come corporally before you and by what means you can compel him to find sufficient manucaptors who will bail him under a certain penalty to be reasonably imposed on them by you for which you will answer to us. In witness, &c.

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[a] *Ex parte Brunker*, 3 P. Wms., 313, n.; *Dick* v. *Swinton*, 1 Ves. & B. 373. 2 Madd. Ch. Pr., *tit.* "Ne exeat regno."

[b] 2 Madd. *suprà*.

[c] 2 Madd. Ch. Pr. 278; and see *Hyde* v. *Whitfield*, 19 Ves. 342; *Boehm* v. *Wood*, 1 Turn. & Russ. 343; *Whitehouse* v. *Partridge*, 3 Swanst. 377.

[d] *Goodman* v. *Sayers*, 5 Madd. 471.

[e] *Street* v. *Street*, 1 Turn. & Russ. 322.

[f] *Donne's ca.*, 1 P. Wms. 262; *Wilson* v. *Boswell*, 2 Dick. 535.

[g] *Bernal* v. *Donnegal*, 11 Ves. 47; see also *Howden* v. *Rogers*, 1 Ves. & B. 133.

[h] *Anon.* 6 Mad. 276.

[i] 2 Mad. Ch. Pr. 278.

[k] *Jackson* v. *Petrie*, 10 Ves. jun. 164.

[l] Ibid.

[m] 1 Fitz. Nat. Br. 84.

Or thus—

And him the said *A. B.* to find sufficient security under the penalty of £ —— to be paid to our use or any one of them in the penalty of &c. that he go not towards foreign parts without our special licence nor presume to prosecute or cause to be attempted to be prosecuted anything whatsoever there which may be able to prevail to the contempt of us or to the prejudice or damage of our people nor send any person or persons there for that purpose. And if he shall refuse to do this before you that then you do commit him the said *A. B.* to our next gaol to be kept safely in the same until he will freely do so; and when you shall have so taken that security thereupon without delay distinctly and openly inform us thereof or certify in our Chancery under your seal remitting to us this writ &c. Witness &c.

### *Return of Cepi Corpus.*

I have caused the within-named *A.* corporally to come before me and he found bail in the penalty of £ —— according to the command of the within writ.

The answer of —— High Sheriff.[a]

## SECT. VIII.

### CAPIAS.

THIS writ *was* the first step in a personal action, but at the commencement of the present reign it ceased to be so. It is now a process in the nature of a *ne exeat regno;* and *collateral* to the action.[b] Its nature and object will be best understood from an attentive perusal of the statute which thus changed its character. The 1 & 2 Vict. c. 110, s. 3, enacts, "If a plaintiff in any action in any of her Majesty's superior Courts of Law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a judge or without such order, shall, by the affidavit of himself or of some other person, show to the satisfaction of a judge of one of the said superior Courts, that such plaintiff has *a cause of action against the defendant or defendants to the amount of 20l.* or upwards, or has sustained damage to that amount, *and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to quit England,* unless he or they be forthwith apprehended, it shall be lawful for such judge, by a special order, to direct, that such defendant or defendants so about to quit England shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out *one or more writ or writs* of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be *held to bail,* which writ of *capias* shall be in the

Nature of, since 1 and 2 Vict. c. 110.

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[a] For returns generally, see following chapter.

[b] See *Ireland* v. *Berry,* 1 D. & L. 868; *Turner* v. *Parker,* 2 Ib. 444; *Neale* v. *Snoulten,* 3 Ib. 422.

Amount of debt.

form contained in the schedule to this act annexed, and shall bear date on the day on which the same shall be issued." The *minimum* arrestable amount is 20*l.*, be the arrest in England, Wales, or County Palatine.[a] "The Absconding Debtors Arrest Act, 1851," (14 & 15 Vict. c. 52,) confers on the Commissioners of the Court of Bankruptcy, acting for any district in the country, and upon the judges of District County Courts (except the County Court Judges acting in *Middlesex* and *Surrey*), the power of granting a *warrant* as auxiliary to such writ of *capias*. But of this more hereafter.[b]

Nature of claim.

The claim may be for a debt or money demand, or, in some cases, for unliquidated damages. A cause of action, for which an action at law will lie, must appear on the face of the affidavit.[c] Where goods have been sold, but not delivered, a *capias* would not be granted; for it is not reasonable that the plaintiff should have the security of the defendant's body under arrest, and also retain the security of the goods in his own hands.[d] So, it would not be granted against a surety in an action on a bail bond (for this would lead to bail *ad infinitum*): but when judgment is obtained in such an action, and a second action is brought upon the judgment, there is then no objection to the writ; for there is included a new cause of action, viz. the costs.[e] In an action on a *penal* statute, not being remedial, and the writ not being expressly given by the Act, this writ will not be granted, even for a sum certain; as it is a maxim that every man is presumed to be innocent, until the contrary be proved.[f] Before *The Common Law Procedure Act*, 1852, (which virtually abolished the forms of actions,) it was allowed to issue in *case*, *trover*, *trespass*, and in *detinue*, as well as in *debt*, *assumpsit* and *covenant*. As a general rule the writ will only be granted where the claim is certain, or capable of being made so by calculation;[g] but this is not universally so; for it has often been granted in actions for *unliquidated* damages. The rule may be stated more correctly thus: when the claim is for a debt, for which an action at law will lie, or for damages, when it is apparent that they amount at least to 20*l.*, a judge has the power to grant it. The defendant may appeal to a Court, or to another judge, against the arrest order; and the whole matter is then so left at large, that the merits of the case, or his intention to go abroad, may be tried on affidavit.[h]

General rule of granting it.

Appeal against order.

Privilege from arrest.

But there are persons privileged from arrest on civil process. This privilege is of two kinds, viz. permanent and temporary. The former prevents the *issuing* of the writ, the latter suspends its *execution*. The following persons are permanently privileged.[i]

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[a] *Brown* v. *M'Millan*, 7 M. & W. 196. 14 & 15 Vict. c. 52, s. 1.

[b] And see *Masters* v. *Johnson*, 8 Exch. 63.

[c] *Gadsden* v. *McLean*, 9 C. B. 287.

[d] *Hopkins* v. *Vaughan*, 12 East, 398; *Pontifex* v. *De Maltzoff*, 1 Exch. 436.

[e] *Brander* v. *Robson*, 6 T. R. 336; *Prendergast* v. *Davis*, 8 Ib. 85.

[f] *Sutton* v. *Oswald*, 1 Dowl. P. C. 348; 1 Tidd's Pr. 172.

[g] *Lear* v. *Heath*, 5 Taunt. 201; *Waters* v. *Joyce*, 1 D. & R. 150.

[h] 1 & 2 Vict. c. 110, s. 6; *Pegler* v. *Hislop*, 1 Exch. 438; *Graham* v. *Sandrinelli*, 4 D. & L. 317.

[i] Impey's Office of Sheriff, *arrest*.

The Sovereign; the Lord Chancellor; the Lord Keeper; Peers, temporal and spiritual, English, Scotch, or Irish; Peeresses by birth, marriage, or creation; the widows of peers; members of the House of Commons;[a] Bishops, and it seems members of Convocation; Ambassadors and their domestic servants;[b] Judges and their necessary servants; Masters in Chancery, cursitors, ministers, and known clerks of the Court of Chancery, and the menial servants of the Chancellor or Keeper, or of their ministers and officers; assistant officers of both Houses of Parliament who are summoned, and continually attend there; the serjeant at arms, doorkeepers, clerks, &c.; persons who are the servants of the Sovereign, and liable to be called on as such, to perform services;[c] auditor of the Exchequer and other officers, a certificated bankrupt for any demand provable under the bankruptcy;[d] persons discharged under the insolvent act for debts scheduled.[e] Executors, administrators, heirs (for the debts of the deceased);[f] corporators, hundredors; all petty officers and seamen[g] (for debts contracted subsequently to their having entered the service or for a debt previously contracted less than 30*l.* over and above all costs of suit); soldiers,[h] marines[g] (except when the debt amounts to 30*l.*, over and above all costs of suit); bail; and married women.[i] The persons *temporarily* privileged from arrest are a bankrupt, in coming to surrender, and after such surrender, during the time by " The Bankrupt Law Consolidation Act, 1849," limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination, until his certificate be allowed, as the Court shall from time to time by endorsement upon the summons of such bankrupt think fit to appoint[k]: a barrister *eundo, morando et redeundo* from the Courts at Westminster and of Circuit;[l] an

**Persons temporarily privileged.**

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[a] See *Goudy* v. *Duncombe*, 1 Exch. 435, as to duration of privilege.

[b] 7 Anne, c. 12, s. 3. *Forrester's Ca.*, Temp. Ld. Talbot, 281; a consul has not the privilege, *Viveash* v. *Becker*, 3 M. & S. 284.

[c] See *Dyer* v. *Disney*, 16 M. & W. 312; *Harvey* v. *Dakin*, 3 Exch. 266.

[d] 12 & 13 Vict. c. 106, s. 205; see *Wearing* v. *Smith*, 9 Q. B. 1025; *Woolley* v. *Smith*, 3 C. B. 624; *Clark* v. *Smith*, Ib. 991.

[e] See *Francis* v. *Dodsworth*, 4 C. B. 208.

[f] 3 Bl. Comm. 292; but if an executor or administrator be guilty of a *devastavit*, he may be arrested by a creditor upon a judgment suggesting such *devastavit;* 1 Salk. 98; *Leonard* v. *Simpson*, 2 Bing. N. C. 176; or on a sufficient promise in *writing* to pay such a debt, he may be arrested; 1 Term R. 716.

[g] 16 & 17 Vict. c. 10, s. 56.

[h] 16 & 17 Vict. c. 9, s. 52: see also 8 East, 105; 4 Taunt. 557.

[i] See *post.*

[k] 12 & 13 Vict. c. 106, ss. 112, 162: see *Norton* v. *Walker*, 3 Exch. 480.

[l] *Luntly* v. *Nathaniel*, 2 Dowl. 51; *Newton* v. *Constable*, 2 Q. B. 166. N. (a Barrister) went on speculation to the petty Sessions, but when there was actually engaged in the business of the Courts; held, privileged *redeundo.* Does not this apply to *Westminster Hall* as well, even supposing attendance to be based on usage or prescription as suggested in some of the cases?

attorney[a] and parliamentary agent:[b] parties to a cause;[c] jurors, witnesses[d] *eundo, morando et redeundo* from any of the Superior Courts, Committees of either House of Parliament,[e] Bankruptcy Court,[f] Insolvent Debtors' Court,[g] Courts Martial,[h] the County Court,[i] and all Inferior Courts of law.[k] When a cause has been referred under an order of *nisi prius,* or by submission containing a clause to make it a rule of court, parties and witnesses are privileged as if the same were still before the court.[l] So on writs of inquiry.[m] Clergymen *eundo, morando et redeundo* from performing divine service are privileged from arrest.[n] A party taken under an irregular writ is privileged, in returning from the chambers of the judge who has discharged him; although the attendance there be of his own seeking, as by *habeas corpus.*[o] Aliens are not as such privileged from arrest. One foreigner may arrest another in this country for a debt which accrued in a foreign country while both resided there, and he may do so, although the law of the foreign country does not allow of arrest for debt.[p] An attorney when going abroad may be arrested.[q] An attorney's clerk going to or returning from judges' chambers on business, having reference to a pending suit, is not privileged from arrest.[r] An acquitted prisoner has no privilege *redeundo.*[s] In many of the cases above named, it is not the privilege of the individual, but a protection thrown over him by the law of nations, or by the municipal law for the benefit of others, whose privilege it really is. Being so, there seems to be no sound reason against the privilege being waived by the person who is invested with it, as for instance, by the Lord Chamberlain, ambassadors, and the like.

Distinction important to Sheriff.

A permanent privilege, as before stated, prevents the issuing of a *capias;* a temporary privilege prevents the execution only *durante privilegio.* The distinction is important to the Sheriff, for he would, in some cases of permanent privilege, by executing a *capias* incur a fine, imprisonment, and even corporal punishment;

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[a] *Clutterbuck* v. *Hulls,* 4 D. & L. 80.

[b] *Ex parte Watkins,* 8 Sim. 377.

[c] *Cameron* v. *Lightfoot,* 2 Wm. Bl. 1118; *Pitt* v. *Coomes,* 5 B. & Ad. 1078.

[d] Whether compelled by subpœna to attend, or not; *Meekins* v. *Smith,* 1 H. Bl. 636. See also *Newton* v. *Harland,* 8 Sc. 70. *In re Douglas,* 3 Q. B. 836; 1 Tidd's Pr. 198. 213; *Strong* v. *Dickenson,* 1 M. & W. 490.

[e] *Spry's Ca.*

[f] *Selby* v. *Hills,* 8 Bing. 166; 1 Dowl. 257, S. C.

[g] *Willingham* v. *Matthews,* 6 Taunt. 356.

[h] 53 Geo. c. 17, s. 27.

[i] *Clutterbuck* v. *Hulls,* 4 D. & L. 82.

[k] Phill. on Ev.; Com. Dig. *Privilege* (A.); 2 Q. B. 166.

[l] *Randall* v. *Gurney,* 3 B. & A. 252; *Webb* v. *Taylor,* 1 D. & L. 676.

[m] *Walters* v. *Rees,* 4 B. Moore, 34; *Newton* v. *Constable,* 2 Q. B. 160.

[n] To arrest him is a *misdemeanor* by 9 Geo. 4, c. 31, s. 28; and see *Goddard* v. *Harris,* 7 Bing. 320.

[o] *Rex* v. *Blake,* 4 B. & Ad. 355.

[p] *De la Vega* v. *Vianna,* 1 B. & Ad. 284, overruling *Melan* v. *Duke de Fitzjames,* 1 B. & P. 138: see also *Trimbey* v. *Vignier,* 1 Bing. N. C. 151.

[q] *Thomson* v. *Moore,* 1 Dowl. N. C. 288; *Flight* v. *Cook,* 1 D. & L. 715. As to an *attorney's* privilege, see Gilb. C. B. 209; *Turbill's Ca.,* 1 Saund. 67; 8 T. R. 417.

[r] *Phillips* v. *Pound,* 7 Exch. 880.

[s] *Hare* v. *Hyde,* 16 Q. B. 394.

If, for instance, he were to execute a capias on a peer,[a] peeress, or a member of the House of Commons, he might be committed by the House of Lords or Commons for a breach of privilege. So, for arresting an ambassador or his domestic, not only the sheriff and his officers, but also the plaintiff, at whose suit the process issued, and his attorney, would be subject to fine, imprisonment, and corporal punishment, provided the name of such servant has been properly registered, at the office of the Secretary of State, and thence transmitted to the office of the Sheriffs of London and Middlesex. So by the 9 Geo. 4, c. 31, s. 23, a party arresting a clergyman [illegible] privilege, with knowledge, is guilty of a misdemeanor. The Sheriff is not liable in damages for executing a capias upon an individual so privileged; even though influenced by malicious motives in executing it upon a person whom he knew to be so privileged.[b] He may therefore in general arrest, but he is not obliged to arrest a privileged person. If he choose to take the onus of the facts upon himself and refuse to execute the writ, he may do so, and the facts constituting the privilege will be a good return. The proper remedy, for the person arrested, is an application for discharge.[c]

Whether he should arrest or not.

## *Affidavit.*[d]

In the Q. B. } A. B.
} C. D.

A. B. the above-named plaintiff maketh oath and saith, that C. D. before and at the time of the commencement of this suit was and still is justly and truly indebted

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[a] If a peer be arrested, the Court or a judge will discharge him upon application for that purpose, and they will not, upon such application, enter into the right to the title. The privilege of an Irish peer is primâ facie established. Berry v. Birmingham, 3 D. & R. 433; and vide Lowe v. Pembleton, 7 Taunt. 683. As to a Scotch peer, see Digby v. Stirling, 1 M. & Sc. 116, 1 Dowl. P. C. 248, S. C.; his being a peer, and having acted as such, is sufficient.

[b] Tarlton v. Fisher, 2 Doug. 671; Cameron v. Lightfoot, 2 Wm. Bl. 1190; Newton v. Constable, 2 Q. B. 157; Magnay v. Burt, 5 Q. B. 381; [illegible] v. Walker, 3 [illegible]: as to the liability of the party and his attorney, see Yearsley v. Heane, 14 M. & W. 322; Evans v. Jones, ib. 727; West v. Smallwood, 3 M. & W. 418. Action for maliciously obtaining order for a capias, Daniels v. Fielding, 4 D. & L. 329.

[c] Graham v. Sandrinelli, 4 D. & L. 317.

[d] If made after writ of summons issued it should be entitled in the cause. The true place of abode and addition of any person making an affidavit must be inserted therein. An affidavit sworn before a judge of any of the Courts shall be received in the Court in which such judge sits, although not entitled of that Court, but not in any Court unless entitled of the Court in which it is to be used. Reg. Gen. H. T. 1853, r. 144. It may also be sworn before a commissioner of such Court in England, Scotland, or Ireland (3 & 4 Will. 4, c. 42). If sworn before a person having no authority to take it, it would be a nullity. Sharpe v. Johnson, 4 Dowl. 324. It may be made in a foreign country; but, if sworn abroad, not only the person's signature to the jurat, but also his authority to administer the oath, and take affidavits, must be verified by an affidavit to be made in this country. Preston v. Bolton, 1 M. & R. 302; where the judge had not signed the jurat the proceedings were set aside. Bell v. Barnes, 2 M. & W. 217.

The captain of a steamer between an English port and Hamburgh, and about to depart on one of his regular voyages, is not a person about to quit England, within the meaning of 1 & 2 Vict. c. 110, Atkinson v. Blake, 1 Dowl. N. C. 263; and see Lawton v. Walker, 4 M. & W. 251; but it extends to a case where a man is domiciled in Ireland, and is about to quit England for the purpose of going there. Lamond v. Eiffe, 3 Q. B. 910.

An affidavit of circumstances showing

to this deponent in £ —— for goods before then sold and delivered by this deponent to the said *C. D.* at his request [*or whatever else may be the cause of action*:] and this deponent further saith that the said *C. D.* now is a captain actually serving in her Majesty's —— regiment of the line and did on the —— day of —— A.D. 18— receive orders to proceed without delay along with his regiment to parts beyond the jurisdiction of this Court namely to Quebec in North America: and this deponent further saith that for the reason aforesaid he verily believes that unless the said *C. D.* be forthwith apprehended he will quit England.

Sworn, &c.

## *Writ.*[a]

Victoria &c. to &c. greeting: We command you that you omit not by reason of any liberty in your bailiwick but that you enter the same and take *C. D.* if he shall be found in your bailiwick and him safely keep until he shall have given you bail or made deposit with you according to law in an action on *contract* [or "*of tort*"] at the suit of *A. B.* or until the said *C. D.* shall by other lawful means be discharged from your custody. And we do further command you that on execution hereof you do deliver a copy hereof to the said *C. D.* And we hereby require the said *C. D.* to take notice that within eight days after the execution hereof on him inclusive of the day of such execution he should cause special bail to be put in for

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a mere case of suspicion, that a man is about to quit England, is not sufficient, *Harvey* v. *O'Meara*, 7 Dowl. 725; *Graham* v. *Sandrinelli*, 4 D. & L. 317. The affidavit as to the existence of the cause of action must be positive, *Willis* v. *Snook*, 8 M. & W. 147; *Pegler* v. *Hislop*, 1 Exch. 437; *Pontifex* v. *De Maltzoff*, Ib. 436. If made by a third person it is not necessary to show any connection between himself and the plaintiff, *Holliday* v. *Lawes*, 3 Bing. N. C. 541; *Short* v. *Campbell*, 3 Dowl. 487; nor to show the deponent's means of knowledge of the debt; *Holliday* v. *Lawes*, 3 Bing. N. C. 541; *Wheeler* v. *Copeland*, 5 T. R. 364. When it is impossible to swear positively to the debt, as where the plaintiff sues in *auter droit*, *Sheldon* v. *Baker*, 1 T. R. 83; *Roche* v. *Carey*, 2 W. Bl. 850; or as assignee of a bankrupt, swearing to his belief, or swearing "as appears by the bankrupt's books, *and* as he verily believes," is sufficient, *Lowe* v. *Farley*, 1 Ch. Rep. 92. So, in the case of an assignee of a bond, or the like, he may swear "to the best of his knowledge and belief," *Cresswell* v. *Lovell*, 8 T. R. 418. So, where the cause of action arose from the nonpayment of bills in India, the parties swearing that they were not paid "*to his knowledge and belief*" in India, or elsewhere, was held sufficient, *Hobson* v. *Campbell*, 1 H. Bl. 245. An affidavit bad in part, is bad altogether, *Pontifex* v. *De Maltzoff*, 1 Exch. 436; *Raggett* v. *Guy*, 3 Dowl. 554; *Drake* v. *Harding*, 4 Ib. 34: but if good as to one distinct sum, and that be an arrestable amount, this will do, unless it appears that process was issued for the whole amount, and not for the former sum only, *Caunce* v. *Rigby*, 3 M. & W. 67. Where the sum sworn to consists partly of *interest*, it must appear that the sum is due on a contract of payment of interest, or that a sum of 20*l.* is due independent of interest, *Neale* v. *Snoulten*, 2 C. B. 320.

[a] 1 & 2 Vict. c. 110, sch. As to direction of, see *Edwards* v. *Robertson*, 5 M. & W. 520; *Copley* v. *Medeiros*, 2 D. & L. 74. When it was directed to the Sheriffs of Middlesex he was discharged, *Moore* v. *Magan*, 16 M. & W. 98. It may be amended, *Plock* v. *Pacheco*, 9 M. & W. 344, 474; *Rennie* v. *Bruce*, 2 D. & L. 951. See effect of discrepancy between affidavit and capias, 1 Dowl. N. C. 384, 386; 9 M. & W. 474.

A party arrested by order of a judge may apply, for his discharge, either to the Court, or to another judge; and may, on such application, use affidavits to contradict or explain that on which the order was granted; and he may appeal to the Court against the decision of such latter judge. The Court will not revoke the order nor set aside the *capias*; but simply discharge the defendant out of custody. *Graham* v. *Sandrinelli*, 4 D. & L. 317; *Burness* v. *Guiranovich*, 4 Exch. 520. The application should be made promptly; *semble*, within the time allowed for putting in bail, *Sugars* v. *Concanen*, 5 M. & W. 30; *Brashour* v. *Russell*, 4 Bing. N. C. 31.

him in our Court of —— to the said action and that in default of so doing such proceedings may be had and taken as are mentioned in the warning written or indorsed hereon. And we do further command you that immediately after the execution hereof you do return this writ to our said Court of —— together with the manner in which you shall have executed the same and the day of the execution thereof; or if the same shall remain unexecuted then that you do so return the same at the expiration of one calendar month from the date hereof or sooner if you shall be thereto required by order of the said Court or by any judge thereof. Witness —— at Westminster [*or as the case may be*] the —— day of ——.

### *Memorandum.*

This writ is to be executed within one calendar month from the date thereof including the day of such date and not afterwards.

### *Warning.*

If a defendant having given bail on the arrest shall omit to put in special bail as required, the plaintiff may proceed against the Sheriff or on the bail bond.

### *Indorsements.*

Bail for —— pounds by order of —— [*naming the judge making the order*] dated this —— day of ——.

This writ was issued by *E. F.* of —— attorney for the plaintiff [*or* "plaintiffs"] within-named.

*Or*

This writ was issued in person by the plaintiff within-named who resides at —— [*mention the city, town or parish, and also the name of the hamlet, street and number of the house of the plaintiff's residence, if any such there be.*]

### *Warrant.*

W. to wit. —— Esq. Sheriff of the county aforesaid: To —— and —— my bailiffs greeting. By virtue of the Queen's writ of capias to me directed I command each and every of you jointly and severally that you omit not by reason of any liberty in my bailiwick but that you enter the same and take —— if he shall be found in my bailiwick and him safely keep until he shall have given me bail or made deposit with me according to law in an action *on contract* at the suit of —— or until the said —— shall by other lawful means be discharged from my custody; and I do further command each and every of you jointly and severally that on execution hereof you do deliver to him a copy of the said writ herewith delivered to you; and I do further command you that immediately after the execution hereof you do certify to me the manner in which you shall have executed the same and the day of the execution hereof so that I may return the same to her Majesty's said Court or that if the same shall remain unexecuted then that you do so return this my warrant at the expiration of one calendar month from the date of the said writ or sooner if thereto required. Dated the —— day of —— 18—.

[*Seal of office.*] —— High Sheriff.

**By whom to be executed.**

The Sheriff himself may personally execute the writ, and so may his Under-sheriff, without warrant.[a] It is usually executed by a bound-bailiff, under and by virtue of a warrant, stating the cause of action, the sum for which the defendant is to be held to bail, and at whose suit. If directed to *two* or more *jointly and severally*, any one may execute the writ; but, if directed to them *jointly*, all must be acting in the arrest, otherwise it will be illegal.[a] If it be directed to *A. B.*, and, after it is issued, *A. B.* insert the name of *C. D.*;[b] or, if any part of it be left blank, and, after it is issued, filled up,[c] the warrant is void. The person making out the warrant must, at the time he does it, actually have the writ in his custody.[d] The day and year, set down on the writ, must also be set down on the warrant, under the penalty of 10*l.*[e]

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[a] Dalt. 103.

**When to be executed.** It is to be executed *within one calendar month after the date thereof*, including the day of such date, but not afterwards. Under the 14 & 15 Vict. c. 52, the capias must be issued and served within seven days after the warrant is obtained.[f] The defendant, when arrested, must remain in custody until he shall have given a *bail bond* to the Sheriff, or shall have made deposit of the sum indorsed on the writ, together with 10*l.* for costs. Although valid for *one* calendar month, he must set about executing the writ in a reasonable time after it is delivered to him: and he must arrest on the first opportunity.[g] It cannot be executed on a Sunday.[h] After a *negligent* escape, however, the defendant may be retaken on a Sunday.[i] Bail also may take the principal on a Sunday.[k] It may be executed at any hour, by day or by night.[l]

**Where to be executed.** If the writ is to be executed within a liberty (as the writ contains a *non omittas clause*) no warrant to the bailiff of the liberty is required;[m] for the Sheriff, and not the bailiff, must execute a writ containing such a clause.[n] There used to be, especially in *London* and *Southwark*, many supposed sanctuaries from justice, under the pretext of their being ancient Royal Palaces, and the like; but they were for the most part abolished by the 8 & 9 W. 3, c. 27, s. 15; see also 9 Geo. 1, c. 28, s. 1; 11 Geo. 1, c. 22, s. 1. The Sheriff, however, should not arrest in a Court of Justice, nor in the Royal Residence; for although the arrest might be good, yet he would be guilty of a contempt, and might be punished accordingly.[o]

**Arrest how made.** The arrest is usually made by corporal seizure or by touch, but this is not absolutely necessary;[p] where the officer went into the room and fastened the door, telling the debtor at the same time that he arrested him, it was held a good arrest.[q] A correct copy of the writ must be upon or forthwith after the arrest delivered to the defendant.[r] The officer to whom the warrant is directed need not be the person *actually* making the arrest, nor need he be within sight when the arrest is made, but he must be acting in the arrest, he cannot stay at home and send another to make it.[a] A gaoler cannot be compelled to accept a *capias* under 1 & 2 Vict. c. 110, in order that it may operate as a detainer: in such cases it should be delivered to the Sheriff, and the gaoler should be prevailed upon to act as a friend, and communicate to the parties concerned the time when the defendant is likely to be discharged out of custody.[b]

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[a] 2 Taunt. Rep. 161; Co. Litt. 181 b.

[b] *Housin* v. *Barrow*, 6 T. R. 122.

[c] *Burslem* v. *Fyrn*, 2 Wils. 47.

[d] 6 Geo. 1, c. 25, s. 53.

[e] Ibid.

[f] *Masters* v. *Johnson*, 8 Exch. 63.

[g] *Brown* v. *Jarvis*, 5 Dowl. 281.

[h] 29 Car. 2, c. 7, s. 6; *Taylor* v. *Phillips*, 3 East, 155; *Eggington's Case*, 2 E. & B. 717.

[i] *Parker* v. *Moor*, 2 Salk. 626: see also 5 T. R. 25.

[k] *Anon.* 6 Mod. 231.

[l] 2 Chit. Rep. 357.

[m] *Carrett* v. *Smallpage*, 9 East, 330.

[n] *Ante*, p. 44.

[o] *The King* v. *Stobbs*, 3 T. R. 735; *Hare* v. *Hyde*, 16 Q. B. 394.

[p] *Harrison* v. *Hodgson*, 10 B. & C. 445; *Williams* v. *Jones*, 2 Str. 1049; *Genner* v. *Sparks*, 1 Salk. 79; *Robins* v. *Hender*, 3 Dowl. 545.

[q] *Williams* v. *Jones*, Cas. Temp. Hardw.: see also Bull. N. P. 62; *Grainger* v. *Hill*, 5 Scott, 561; *Berry* v. *Adamson*, 6 B. & C. 528.

[r] *Shearman* v. *M'Knight*, 5 Dowl. 572; *Copley* v. *Medeiros*, 8 Sc. N. C. 172.

The following form a part of the general rules of Hilary Term, 1853.

**Reg. Gen. of Hil.T.1853.**

81. The Sheriff, or other officer or person to whom any writ of capias shall be directed, or who shall have the execution and return thereof, shall, within six days at least after the execution thereof, indorse on such writ the true day of the execution thereof.

**Indorsement of service.**

82. Where the defendant is described, in the writ of capias or affidavit to hold to bail, by initials, or by a wrong name, or without a Christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled, on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name.

**Defendant described by wrong name.**

83. An action may be brought upon a bail-bond by the Sheriff himself in any Court.

**Proceedings upon Bail-Bond.**

84. In all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it.

85. Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more.

86. When bail to the Sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond.

87. A plaintiff shall not be at liberty to proceed on the bail-bond pending a rule to bring in the body of the defendant.

88. No rule shall be drawn up for setting aside an attachment, regularly obtained against a Sheriff, for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits, or if made on the part of the Sheriff, or bail, or any officer of the Sheriff, be grounded on an affidavit, showing that such application is really and truly made on the part of the Sheriff, or bail, or officer of the Sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant.

89. Whenever a plaintiff shall rule the Sheriff on a return of cepi corpus to bring in the body, the defendant shall be at liberty to put in and perfect bail, at any time before the expiration of such rule; and, a plaintiff having so ruled the Sheriff, shall not proceed

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[a] *Blatch* v. *Archer*, Cowp. 65.

[b] *Edwards* v. *Robertson*, 7 Dowl. 858.

on any assignment of the bail-bond, until the time has expired to bring in the body as aforesaid.

90. In case a rule for returning a writ of capias shall expire in vacation, and the Sheriff or other officer having the return of such writ shall return cepi corpus thereon, a rule may thereupon issue, requiring the Sheriff or other officer, within the like number of days after the service of such rule as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court, by forthwith putting in and perfecting bail above to the action; and if the Sheriff or other officer shall not duly obey such rule, an attachment shall issue in the following term for disobedience of such rule, whether the bail shall or shall not have been put in and perfected in the meantime.

Bail.

91. Notice of more bail than two shall be deemed irregular, unless by order of the Court or a Judge.

92. The bail of whom notice shall be given, shall not be changed without leave of the Court or a Judge.

93. No person or person shall be permitted to justify himself or themselves as good and sufficient bail for any defendant or defendants if such person or persons shall have been indemnified for so doing by the attorney or attorneys concerned for any such defendant or defendants.

94. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, or a sheriff's officer, bailiff, or person concerned in the execution of process, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond as soon as the time for putting in bail has expired, unless good bail be duly put in in the meantime.

95. In the case of country bail, the bail-piece shall be transmitted and filed within eight days.

96. A defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. If the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days, then (unless the Court or a Judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the meantime.

97. Every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder.

98. If the notice of bail shall be accompanied by an affidavit of each of the bail, according to the following form, and if the plaintiff afterwards except to such bail, he shall, if such bail are

allowed, pay the costs of justification; and, if such bail are rejected, the defendant shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order.

99. If the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit.

100. Where notice of bail shall not be accompanied by such affidavit, and in bail in error, the plaintiff may except thereto within twenty days next after the putting in of such bail and notice thereof given in writing to the plaintiff or his attorney, or where special bail is put in before any Commissioner the plaintiff may except thereto within twenty days next after the bail-piece is transmitted and notice thereof given as aforesaid; and no exception to bail shall be admitted after the time hereinbefore limited.

101. Affidavits of justification shall be deemed insufficient unless they state that each person justifying is worth double the amount sworn to over and above what will pay his just debts, and over and above every other sum for which he is then bail, except when the sum sworn to exceeds 1000*l.*, when it shall be sufficient for the bail to justify in 1000*l.* beyond the sum sworn to.

102. It shall be sufficient, in all cases, if notice of justification of bail be given two days before the time of justification.

103. In all cases bail either to the action or in error shall be justified, when required, within four days after exception, before a Judge at chambers, both in term and vacation.

**Render in discharge of bail.**

104. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.

105. Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night.

106. On application by a defendant or his bail, or either of them, for an order to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the Sheriff of what county he was arrested, which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail; and that on such lodgment and render a notice thereof, and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated, without entering any exoneretur.

107. If a defendant shall be in custody of the gaoler of any county gaol by virtue of any process issued out of any of the said Courts, he may be rendered in discharge of his bail in any action depending in the said Court in like manner as is last hereinbefore

provided, and thereupon the bail shall be wholly exonerated without entering any exoneretur.

108. Where the plaintiff proceeds by action on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, but not at any later period; and notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

Liability of bail.

109. Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance.

110. To entitle bail to a stay of proceedings pending a writ of error, the application must be made before the time to surrender is out.

111. When two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney or agent,) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected.

### *Bail Bond.*[a]

Know all men by these presents that we —— are held and firmly bound to —— Sheriff of the county of —— in the penal sum of —— of good and lawful money of Great Britain to be paid to the said Sheriff or his certain attorney executors administrators or assigns for which payment to be well and faithfully made we bind ourselves and every one of us by himself for the whole and every part thereof and the heirs executors and administrators of us and every of us firmly by these presents sealed with our seals. Dated this &c. WHEREAS the above bounden —— was on the —— day of —— taken by the said Sheriff in the bailiwick of the said Sheriff by virtue of the Queen's writ of capias issued out of her Majesty's Court of —— bearing date at Westminster the —— day of —— to the said Sheriff directed and delivered against the said —— in an action on —— at the suit of ——. And whereas a copy of the said writ together with every memorandum or notice subscribed thereto and all indorsements thereon was on execution thereof duly delivered to the said ——. And whereas the said —— is by the said writ required to cause special bail to be put in to the said action in the said Court within eight days after execution thereof on him inclusive of the day of such execution. Now THE CONDITION of this obligation is such that if the said —— do cause special bail to be put in for him to the said action in her Majesty's said Court as required by the said writ then this present obligation to be void and of no force otherwise to stand and remain in full force vigour and effect.

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[a] He may deposit the sum indorsed, together with 10*l.* for costs, or he may give a bail bond, 1 & 2 Vict. c. 110, s. 4. The Sheriff is to prepare the bond; and, it seems, at the expense of the party arrested, *Milne* v. *Wood*, 5 Car. & P. 587. It does not require a stamp, 5 Geo. 4, c. 41. It is not indispensably necessary to the validity of the bond that there be an actual arrest, *Taylor* v. *Clow*, 1 B. & Ad. 223. The bail bond must be executed on or before the eighth day, or it will be void, *Pullein* v. *Benson*, 1 Ld. Raym. 352; *Taylor* v. *Clow*, 1 B. & Ad. 223. Upon sureties having sufficient within the county, &c., where the arrest was made being tendered, *Lovell* v. *Sheriffs of London*, 15 East, 320 (but for whose *sufficiency* the Sheriff is not answerable, 2 Saund. 61 *b*), the Sheriff is bound to discharge him; Ibid. The security to the Sheriff must be by *bond*—(therefore an attorney's undertaking to the Sheriff is void, 1 Dowl. P. C. 261; as to an undertaking to the plaintiff, see *Evans* v. *Moseley*, 2 Dowl. 364); the bond must be to the Sheriff himself *by the name of his office*: *Rogers* v. *Reeves*, 1 Term Rep. 422; 7 Ib. 109; *Lewis* v. *Knight*, 8 Bing. 271. It is not now conditioned for *appearance*, 2 Q. B. 116.

Sealed and delivered in the presence of ——

## *Assignment of Bail Bond.*[a]

I the within-named Sheriff at the request of the within-named plaintiff assign over to —— this bail-bond pursuant to the statute in such case made and provided. In witness whereof I have hereto set my hand and seal this —— day of ——, 18—.

*G. A.* Esq. High Sheriff.

Sealed and delivered in the presence of
*A. M.*
*S. B.*

## RETURNS.

### *Return of Non est inventus.*

The within-named *C. D.* is not found in my bailiwick.

The answer of —— High Sheriff.

### *Returns of Cepi Corpus et Paratum habeo.*

On the —— day of —— A.D. 18— I took the within-named *C. D.* in my bailiwick and forthwith delivered to him a copy of this writ and him safely kept until he gave me bail [*or* "made deposit with me"] according to law.

The answer of —— High Sheriff.

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[a] The assignment may be made by the Sheriff, or Under-sheriff in the name of his principal, *White* v. *Barrack*, 1 M. & W. 425; or it seems by a person acting in the Under-sheriff's office, *Harris* v. *Ashley*, Tidd's New Pr. 164; *Middleton* v. *Sandford*, 4 Camp. Rep. 36; *sed qu. Kitton* v. *Fag*, 10 Mod. 288. It must be made by *indorsement* on the bond under the hand and seal of the Sheriff, and made in the presence of two credible, that is, disinterested persons, *White* v. *Barrack*, 1 M. & W. 424. It is not necessary that the witnesses should both subscribe their names at the time of the execution of the assignment, *Phillips* v. *Barlow*, 1 Scott's Rep. 322; 1 Bing. N. C. 433, *S. C.*; *Dawes* v. *Papworth*, Willes, 408; 2 Saund. 61 n.: see *post*, "*Action for not assigning Bail Bond.*"

With regard to money deposited with the Sheriff in lieu of giving bail, the practice remains as before the 1 & 2 Vict. c. 110, s. 4, *vide* 43 Geo. 3. 46; 8 Dowl. P. C. 914, and Ib. 11; 6 M. & W. 90. An execution creditor in another action cannot have this money, *France* v. *Campbell*, 9 Dowl. 914. The Sheriff must, it seems, within the eight days after the arrest, pay the sum deposited into court; which, if defendant duly puts in and perfects special bail or render himself, may be recovered without waiting for the final determination of the suit, *Tuton* v. *Gale*, 1 Dowl. N. S. 383. If defendant neglects to take any further steps the plaintiff is entitled to take the amount (subject to taxation) out of Court without waiting for the final determination of the suit, *Nyssen* v. *Ruysenaers*, 5 Exch. 857. If he leaves the country the court will allow a rule *nisi* to be served by sticking it up in the office, *Know* v. *Duncan*, 9 Dowl. 179. No poundage or other fees can be deducted therefrom, *Haines* v. *Nairn*, 2 Dowl. P. C. 43. Upon receiving a written discharge from the plaintiff or his attorney, the Sheriff is bound to discharge the person arrested without a bail bond, &c., *Martin* v. *Francis*, B. & Ald. 402.

On the —— day of —— A.D. 18— I took the within-named *C. D.* and forthwith delivered to him a copy of this writ and whose body I have ready as within I am commanded. The answer of —— High Sheriff.

On the —— day of —— A.D. 18— I took the within-named *C. D.* and forthwith delivered to him a copy of this writ and whose body is now under my custody in the county gaol at *A.* The answer of —— High Sheriff.

### *Return of prior removal by Habeas Corpus.*

By virtue of this writ to me directed I did on the —— day of —— take the within-named *C. D.* and did safely keep him in her Majesty's prison in and for the county of *W.* until afterwards to wit on &c. I received her said Majesty's writ of *habeas corpus cum causâ* commanding me to have the body of the said *C. D.* before the Right Hon. —— at his chambers in Rolls Yard Chancery Lane London immediately after the receipt of that writ: By virtue of which said writ on the day and at the place therein mentioned I had the body of the said *C. D.* before &c. who then received of me the body of the said *C. D.* and then committed him to the Queen's prison [*or as the case may be*] and then wholly discharged me from further keeping him under my custody: Wherefore I cannot have the body of the said *C. D.* before our said lady the Queen at the day and place within contained as within I am commanded.

The answer of —— High Sheriff.

## Sect. IX.

### ATTACHMENT.

This is a process from a Court of Record, awarded by the Justices at their discretion, on a bare suggestion or on their own knowledge; and is properly grantable in cases of *contempts*, against which all Courts of record may proceed in a summary way.

When it lies against Sheriffs or their officers.

"It seems clear (says Hawkins[a]) from the general reason of the law, (which gives all Courts of record a kind of discretionary power over all abuses by their own officers, in the administration or execution of justice, which bring a disgrace on the Courts themselves, as not taking sufficient care to prevent them,) that wherever it shall appear, that any such officers have been guilty of any corrupt practice in not serving any writ—as where they refuse to do it, unless paid an unreasonable gratuity from the plaintiff—or receive a bribe from the defendant—or give him notice to remove his person or effects, in order to prevent the service of any writ, the Court, which awarded it, may punish such offences in such manner as shall seem proper by attachment, &c., as well as the Court of K. B., which has a general superintendency over all crimes whatsoever (as the Star-chamber had also formerly), but commonly leaves offences of this kind, in relation to causes in *other* Courts, to be punished by such Courts to which they more immediately belong. But if there neither appear to have been any palpable corruption in the case, nor particular obstinacy, as by disobeying a special rule of the Court, in relation to the service of such writ, nor other extraordinary circumstances of wilful negligence, the judgment whereof is to be left to the discretion of the Court, it seems not to be usual to grant an attachment in such cases, but to leave the party to his ordinary remedy against the officer; which he may have either by serving him with rules to return the writ &c., or by suing him for the damage sustained by his negligence, . . . . or by taking out an *alias* and *pluries*, which if the Sheriff do not execute, an attachment, directed to the coroners, goes against him of course, unless he give a good excuse for his not having done it. And if the coroners do not execute the writ, the Court will, in the first instance, grant an attachment against them directed to elizors." So also it is every day's practice to grant attachments for escapes,[a] extortion, "using needless force, violence and terror, in making an arrest; or by breaking open doors where by law it is not justifiable, and there is no plausible excuse for doing it; or treating the persons arrested basely and inhumanly; or keeping them in custody till they consent to pay money for their deliverance; or making an arrest without due authority, as by force of a blank warrant, filled up with the name of a special bailiff by the party himself, or bailiff, without the privity or subsequent agreement of the Sheriff. Yet I have sometimes known attachments of this kind denied, in respect of the common use of the practice, which by experience hath been found to be almost necessary in some cases to prevent the defendant's having notice of the intended arrest; and therefore, if it shall appear to the Court, that there was any such reasonable cause for such a proceeding, it will be a great inducement to excuse, if not wholly to dispense with it. . . . It seems also clear, that where any such officer is guilty of any corrupt practice in depriving the party who sues out a writ of that benefit and advantage which he ought to have from the execution of it, he is liable to be punished in the manner above-mentioned; as if he levy the debt by virtue of an execution, and keep the money in his own hands, and embezzle it: but unless there appear some gross and palpable corruption in a Sheriff neglecting to return a writ, which hath been executed by him, or to bring in the body, or the money &c. according to his return, the Court will hardly grant an attachment against him immediately, but will rather proceed against him by rules to return the writ &c. and if he do not obey them, will increase the amercements upon him till he do, or perhaps grant an attachment for the contempt: and if the Sheriff return, that he sent the process to the bailiff of a liberty, who hath given him no answer, a *non omittas* shall be awarded to the Sheriff: and if he return, that he sent the process to such bailiff, who hath returned a *cepi corpus*, or such like matter, and the bailiff bring not in the body or money &c. at the day, by the better opinion the bailiff shall be amerced, and a writ shall issue to the Sheriff, to distrain the bailiff to bring in the body &c. . . . So if the Sheriff allow the debtor to go at large on bail and *return cepi* and have not the body at the day of *attachment* and *amercement* as formerly is the process. And there seems to be no doubt but that wherever any such officer endeavours to impose upon a Court, by making a return to a writ of a matter known by him to be false, he is, in strictness, liable to be punished in this manner, for his contempt. Yet it seems, that the Court will not easily be prevailed on to proceed in this manner for a bare false return, but will rather leave the party injured by it to his remedy by an action, unless there be some extraordinary circumstances of hardship or oppression; as where an officer who had arrested one on a *capias*, returned, and that he had taken him, but that the party was so sick, that he could not bring in his body at the day for the fear of endangering his life, where in truth the party had been all the while in good health, and was only detained under such pretence, in order to extort money from him &c. And where a Sheriff has been guilty of a contempt in the course of a civil suit, and the defendant afterwards dies, an attachment may still issue against the Sheriff for the prior contempt." It is also granted against persons guilty of *intentional* contempt by word or deed or the process of a Court of Justice.[a]

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[a] Hawk. P. C. b. ii. ch. 22; Bl. Comm. b. iv. c. 20.

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[a] *Arden* v. *Goodacre*, 11 C. B. 367, 371.

Appearance, &c.

Attachments are usually granted on a rule to show cause, unless the offence complained of be of a flagrant nature and positively sworn to, when the attachment will be granted on the first complaint, without any such rule to show cause.[b] The party who is ordered to attend the Court in pursuance of such rule, ought regularly to appear in proper person, and not by attorney. So also must every one against whom an attachment has been granted. If the offence be of a heinous nature, and the person attending the Court upon such a rule to answer it, or appearing upon an attachment, be apparently guilty, the Court will generally commit him immediately, in order to answer interrogatories to be exhibited against him, in relation to such contempt. But if there be any favourable circumstances to extenuate or excuse the offence, or, if it appear doubtful, whether the party be guilty of it or not, the Court will, generally, in their discretion suffer the party, having first given notice of his intention to the prosecutor, to enter into a recognizance to answer such interrogatories; and if no such interrogatories be exhibited within four days after such recognizance, will discharge the recognizance upon motion; yet, if the party do not make such motion, and the interrogatories be exhibited after the four days, the Court will compel him to answer them.

In all the cases above mentioned, if the party fully purge himself upon oath, in his answer to such interrogatories, of the whole matter charged upon him, the Court will discharge him of the contempt, and leave the prosecutor to proceed against him for the perjury, if he think fit; but if the party confess part of the contempts in his answer to such interrogatories, and deny others, the Court will not discharge him from the contempts so denied, but will proceed further to examine the truth of them, and will inflict such punishment as from the whole shall appear reasonable: neither will the Court discharge the party upon a shifting or evasive answer to any material part of the charge against him, but will punish him in the same manner as if he had confessed it. The discretion of the Court, on setting aside an attachment against the Sheriff for the escape of a prisoner taken on a *ca. sa.*, is to be governed by the principle laid down in an action for damages, under 5 & 6 Vict. c. 98, s. 31; and, if necessary, an action will be directed to ascertain the amount of damages, the attachment standing over. The true measure of damages in such a case is the value of the custody of the debtor at the moment of the escape; and no deduction is to be made on account of anything which the plaintiff might have obtained by diligence after escape; but if the plaintiff has done anything to aggravate the loss occasioned by the Sheriff's neglect, or has prevented the Sheriff from retaking the debtor, the damages will be materially affected by such conduct.[a]

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[a] See Ch. Archb. 1516, 1520; *White v. Chapple*, 4 C. B. 628.

[b] See 2 Chit. Archb. 1522.

**Punishment.**

**Setting aside attachment upon terms.**

Attachments for non-payment of costs, and for non-performance of an award, are in the nature of civil executions; so also are attachments out of Chancery for want of appearance, answer, and the like.

### *Attachment for Non-payment of Costs.*

Victoria by the grace of God of the united kingdom of Great Britain and Ireland queen defender of the faith to the Sheriff of —— greeting: Attach *C. D.* so that you have his body before us at Westminster on —— to answer us of and concerning such things as on our behalf shall be then and there objected against him: and have there then this writ. Witness ——.

### *Indorsement thereon.*

*A. B.* against *C. D.* for non-payment of £ —— costs taxed by Master —— pursuant to a rule of Court, dated the —— day of —— 18—.

### *Attachment.*

### (*In Chancery.*)

Victoria &c. to the Sheriff of —— greeting: We command you to attach *C. D.* so as to have him before us in our Court of Chancery immediately after the receipt of this writ[b] [*or* "on the morrow of All Souls next ensuing" *or* "on the —— day of —— next ensuing"] wheresoever the said Court shall then be there to answer to us as well touching a contempt which *C. D.* as it is alleged hath committed against us as also such other matters as shall be then and there laid to his charge and further to perform and abide such order as our said Court shall make in this behalf and hereof fail not and bring this writ with you. Witness ourself at Westminster &c.

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[a] *Arden* v. *Goodacre*, 11 C. B. 367, 371.

[b] All attachments may be made returnable on the old general return days in term, such as the Morrow of All Souls, &c.; or if the party reside or be in London, or within twenty miles thereof, they may be made returnable *immediately*. And where the party resides above twenty miles from London, they may be returnable in vacation; so that there be fifteen days between the teste and return of the writ.

Entry of. When the writ has been sealed, it must be entered in the Registrar's Office, previously to its being executed; after the entry, it is delivered, as in other cases, to the Sheriff for execution. Execution of. Its execution is the same as in other process against the person. A warrant is made out by the Sheriff to his Bailiff, and the Bailiff arrests the party.[a] Upon arrest, the party either goes Bail-bond. to prison, or gives a bail-bond.[b]

This bond is not assignable, so as to enable the assignee to sue upon it in his own name.[c]

### Returns.

#### *Non est Inventus.*

The within-named *C. D.* is not found in my bailiwick.

The answer of —— High Sheriff.

#### *Cepi Corpus.*

I have attached the within-named *C. D.* and have his body ready on the day and at the place within contained as within I am commanded.

The answer of —— High Sheriff.

#### *Attachment for the Peace.*[d]

Victoria &c. To the Sheriff of —— greeting: Because *A. B.* was afraid that he might be in many ways disquieted and made grievous concerning his life and maiming of his limbs by *C. D.* as the said *A. B.* hath made oath before us: Therefore we command you that you do not forbear by reason of any liberty in your bailiwick, but that you attach the said *C. D.* so that you have him before us at W. on &c. to find then before us sufficient security for the keeping of our peace by him towards us and all our people and especially towards the said *A. B.* under a certain penalty then to be imposed on him by us; and when you have so attached the said *C. D.* you are to discharge him on bail until the said day by sufficient manucaptors who shall be willing to bail him under a certain penalty reasonably to be imposed upon them by you as well for the keeping his day as for the keeping our peace by him in the mean time; and for doing your office in this behalf you are only to take of the said *C. D.* 2*s.* 4*d.* Witness &c.

By the Court,
Robinson.

#### *Indorsement.*

This writ is granted on motion in open Court and the cause thereon recorded according to the form of the statute in such case made and provided.

## Section X.

## WRIT OF ASSISTANCE.

The party to whom possession of an estate has been ordered by a decree or order to be delivered up, upon due service of a decree or order for delivery of possession, and upon proof made of demand or refusal to obey such order, is entitled to an Order for a writ of assistance.[a]

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[a] Daniell's Ch. Pr. 431-9.

[b] *Morris* v. *Hayward*, 6 Taunt. 569.

[c] *Meller* v. *Palfreyman*, 1 N. & M. 696.

[d] It is made returnable on a day certain in term, and tested on the day the articles are exhibited, or on the day it issues. Corner, Cr. P. 20; ib. App. 22.

### *Writ of Assistance.*[b]

Victoria &c. to the Sheriff of —— as well present as for the future greeting: Whereas according to the tenor and true meaning of an order made in a certain cause depending in our Court of Chancery between *A. B.* complainant and *C. D.* defendant the said *C. D.* was ordered and enjoined to deliver up possession to —— in the said order named of all that capital messuage or mansion-house lands and premises in the pleadings in the said cause mentioned yet nevertheless he the said —— and other ill-disposed persons his accomplices have refused to pay obedience thereto and detain and keep the possession of the said mansion-house lands and premises in manifest contempt of us and our said Court: know ye therefore that we being willing and desirous that justice should be done to the said —— in this behalf do give unto you full power and authority to place and put the said —— or his assigns without delay into the full peaceable and quiet possession of all and singular the said mansion-house lands and premises with their appurtenances and from time to time as often as there shall or may be occasion to maintain and keep him and his assigns in such peaceable and quiet possession according to the intent and true meaning of the said order of our said Court and therefore we do hereby command and enjoin you that immediately after your receipt of this writ you do go and repair to and enter into and upon the said messuage lands and premises and that you do remove eject and expel the said —— his tenants servants and accomplices each and every of them out of and from the said mansion-house and every part and parcel thereof and that you do place and put the said —— and his assigns into the full peaceable and quiet possession thereof and defend and keep them and their said assigns in such peaceable and quiet possession when and as often as any interruption may or shall from time to time be given or offered to them or any of them according to the true intent and meaning of the said order and herein you are not in anywise to fail. Witness ourself at Westminster the —— day of —— in the —— year of our reign.

### *Indorsement.*

*Writ of Assistance.*

*A. B.* v. *C. D.*

*(Names and address of agent and solicitor.)*

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[a] See Daniell's Ch. Pr. 1051.

[b] This writ must be varied according to the statement in the order.

# CHAPTER V.

## WRITS OF EXECUTION.

Before entering into detail of matters relating to *writs of execution*, it seems convenient to place here two other subjects, essentially and inseparably interwoven with them, namely, *interpleader*, and the *effect* of a judgment, decree, or order, upon the lands or goods of the debtor.

### Section I.

### INTERPLEADER.

Sheriff's position before Interpleader Act.

By the common law, if the property in goods taken under an execution was disputed, (which frequently occurred in the case of bankruptcy; between the Crown and an execution creditor, and the like,) a Court would, in general, enlarge the time for making the Sheriff's return; until the right of property was determined between the claimants, or until one of the claimants had given him a sufficient indemnity. If the doubt arose from a point of *law*, the Court would, in general, interpose its equitable jurisdiction in his favour;[a] that is, where he acted fairly, and was guilty of no neglect of duty;[b] but, where the doubt arose from mere matter of fact, (as he might, as was said, summon an inquest to say whose property it was, before he returned the writ,[c]) that indulgence was granted only under special circumstances, and in particular cases. Other hardships, too, pressed, and still, indeed, do so, on the Sheriff; he could not, for instance, nor can he now, file a bill of interpleader in equity;[d] again, the costs of applying to the Court for enlarging the time for making his return were not, nor are they, under the Interpleader Act, in general, allowed him.[e]

Interpleader Act.

By the Interpleader Act (1 & 2 Will. 4, c. 58) relief is afforded to Sheriffs and other officers in such cases. Section 6, after reciting that difficulties sometimes arise in the execution of process against goods and chattels issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts, and other persons, not being the parties against whom such process has issued, whereby Sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection, in such cases, to such Sheriffs and other officers, enacts, "That when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such Sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such Sheriff or other officer, to call before them by rule of Court, as well the party issuing such process, as the party making such claim, and thereupon to exercise for the adjustment of such claims, and the relief and protection of the Sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court."

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[a] *Wells* v. *Pickman*, 7 T. R. 174; *Thruston* v. *Thruston*, 1 Taunt. 120; *MacGeorge* v. *Birch*, 4 Taunt. 585.

[b] *Colley* v. *Hardy*, 5 M. & R. 123; *Timbrell* v. *Mills*, W. Bl. 205.

[c] 7 T. R. 174.

[d] *Slingsby* v. *Boulton*, 1 V. & B. 334.

[e] *Rex* v. *Cooke*, M'Cl. & Y. 198; Tidd's New Pr. 575; ib. 1017.

**Object of the Act.**

The object of the Act was to give protection to the Sheriff, wherever, by reason of claims to the property seized, he was in danger of actions by the execution creditor, if he yielded to the claim, or, by the claimant, if he executed the writ. But it did not mean to protect him where the resistance was to the writ itself, *i.e.* where the party in the cause objected to any execution on his own goods; for then, the process itself, properly executed, would be his defence.[a] In the case of *Hollier* v. *Laurie*,[b] the intention of the Legislature was a material question. Under a *fi. fa.* against the goods of M. the Sheriff entered the apartments of H. An order for relief was granted to the Sheriff, and an issue was directed to try the right of property in the goods, in which H. succeeded. H. afterwards brought an action of trespass for entering the apartment. The Court unanimously declared that the Act was silent as to giving any protection in cases of wrong done to the realty. In other words, that it only relates to cases where the party, upon whom the claim is made, having no interest himself, is willing to hand over the subject of dispute; and, as a consequence, to cases only where the subject is capable of being so handed over.

In arranging the decisions on the Act, it may be proper to consider them in the following order:—1. Those within the statute. 2. Those not within the statute. 3. Application, time of, &c. 4. The consequence of appearance or non-appearance of the parties. 5. Costs, &c.

**There must be a *claim*.**

The foundation of an application, under this statute, is *a*

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[a] *Fenwick* v. *Laycock*, 2 Q. B. 111.

[b] 4 D. & L. 211; 3 C. B. 334, S. C.: and see *Abbott* v. *Richards*, 3 D. & L. 489; *Cater* v. *Chignell*, 15 Q.B. 217.

*claim* made;[a] anything short of a claim will not do.[b] A claim founded upon a lien has been held sufficient;[c] a claim of part is enough.[d] Applications, under this statute, are not as of course.

When Sheriff will be relieved.

It is the duty of the Sheriff to make some inquiry before he applies for relief. He is not to be spared all trouble, and to abstain from making all inquiry; when *conflicting claims* are advanced *on which he cannot decide*, he may then apply.[e] The goods, or money in dispute, must be actually in his hands at the time of his application to the Court, to entitle him to relief.[f] The Court will protect the Sheriff only from the original seizure, and not from any subsequent misconduct;[g] or, he may be relieved in respect of the adverse claims, and left liable for his negligence in executing the writ.[h] Though the claimant be an infant, the Sheriff may be relieved.[i] Whether the process issued out of any of the Courts at Westminster, or out of the Palatine Courts, relief may be granted;[k] and granted, as well *after* as *before* action brought against the Sheriff.[l]

When not.

The Court, however, will not relieve the Sheriff, under this Act, where he has paid over the proceeds of the execution to the judgment creditor,[m] (though he had no notice of any claim until after he had paid over the money;[n] and may be willing to bring a similar amount into Court;[o]) nor where he has delivered any part of the goods to the claimant;[p] nor where he has accepted an indemnity.[q] The Act does not apply to conflicting executions;[r] nor where the resistance is to the writ itself;[s] nor when he has seized goods in execution which were under a distress for rent, for it is the duty of the Sheriff to inquire whether the rent is due, and if it is, to satisfy it;[t] nor when he withdraws from possession on a claim being set up;[u] nor when, at the request of either party, he delays his application, and by that delay affects the relation of parties.[x] So, if the Sheriff have any interest,[y] or, if his Under-sheriff have any,[z] relief will not be granted, although the

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[a] *Isaac* v. *Spilsbury*, 10 Bing. 3; 2 Dowl. 211; 3 M. & Sc. 341; *Bently* v. *Hook*, 2 Dowl. 339; 2 C. & M. 426; *Cooper* v. *Chitty*, 1 Smith's L. C. 240 *a*.

[b] *Bently* v. *Hook*, *suprà*.

[c] *Ford* v. *Baynton*, 1 Dowl. 358.

[d] *Barker* v. *Dynes*, 1 Dowl. 170.

[e] *Bishop* v. *Hinxman*, 2 Dowl. 166; 4 Ad. & E. 127; 6 Dowl. 136.

[f] *Holton* v. *Guntrip*, 3 M. & W. 145: see vide *Day* v. *Carr*, 7 Exch. 885.

[g] *Lewis* v. *Jones*, 2 M. & W. 204.

[h] *Brackenbury* v. *Lawrie*, 3 Dowl. 180.

[i] *Claridge* v. *Collins*, 7 Dowl. 698.

[k] Tidd's New Pr. 575.

[l] *Green* v. *Brown*, 3 Dowl. 337.

[m] *Anderson* v. *Calloway*, 1 Dowl. 636; 1 C. & M. 182.

[n] *Scott* v. *Lewis*, 1 Gale, 204; 4 Dowl. 259.

[o] *Inland* v. *Bushell*, 5 Dowl. 147.

[p] *Braine* v. *Hunt*, 2 Dowl. 391; *Horton* v. *Earl of Devon*, 4 Exch. 497.

[q] *Ostler* v. *Bower*, 4 Dowl. 606. See also *Patorni* v. *Campbell*, 12 M. & W. 277.

[r] *Bragg* v. *Hopkins*, 2 Dowl. 151; *Salmon* v. *James*, 1 Dowl. 369; *Day* v. *Waldock*, *Lawrence* v. *Waldock*, 1 Dowl. 523.

[s] *Fenwick* v. *Laycock*, 2 Q. B. 111.

[t] *Haythorn* v. *Bush*, 2 Dowl. 641.

[u] *Holton* v. *Guntrip*, 6 Dowl. 180; *Crump* v. *Day*, 4 C. B. 760.

[x] *Mutton* v. *Young*, 4 C. B. 371: see also ib. 760.

[y] *Duddin* v. *Long*, 3 Dowl. 139.

[z] *Ostler* v. *Bower*, 4 Dowl. 605.

Sheriff swears that he does not collude with him.[a] So, where an Under-sheriff, who was acting as attorney for certain creditors of the defendant, informed them of a writ of *fi. fa.*, at the suit of the plaintiff, having been placed in his hands to execute, by which means the issuing of a fiat in bankruptcy was accelerated, and the plaintiff's execution thereby defeated, the Sheriff was refused relief.[b] Neither can the Sheriff have relief when the claim is merely equitable.[c] The Crown cannot be made a party to an interpleader rule;[d] nor can a foreigner residing abroad be compelled to come in.[e] The Act contains no clause to prohibit the Sheriff from applying to the Court, as before, *to enlarge the time for making his return;* and, when he is not relievable under the statute, he may move the Court for that indulgence.[f] **Application, to whom made.** The application may be to the Court or to a judge in chambers;[g] if made to the latter, the Court cannot review his order as regards costs.[h] **Time for making.** The application must be made promptly,[i] or within a reasonable time after the claim is made.[k] *A reasonable time* means, if the claim be made in *vacation*, time sufficient to enable the other parties to show cause in the term next after the claim is made. In one case, it was said that the Sheriff would not be safe unless he applied within the first four days of the term.[l] If made in *term*, it should be made so as to allow the other parties time to appear the same term if possible; any delay on his part must be accounted for in the first instance. If the Sheriff cannot come at once to the Court, being delayed by a rule of Court staying proceedings, it is his duty to watch the rule, and come within four days after it is discharged, if other parties would, by his so doing, be enabled to appear in the same term.[m] **Affidavit.** The affidavit in support of the application, should state the seizure of the goods by the Sheriff under the execution;[n] that they or the proceeds (as the case may be) are, at the time of the application, in his hands;[o] that a claim has been made;[p] that in consequence of such claim he does not know to whom the goods or proceeds belong, or to whom he is liable, and that he is ready to pay into Court, or dispose of the subject-matter of dispute in such manner as the Court may order and direct. Where there is any delay, it must be accounted for by affidavit in the first instance, for no supplemental affidavit is allowable on showing cause.[a] The Sheriff need not deny collusion with any of the parties;[b] nor state that an application has been made either to the execution creditor or to the claimant for an indemnity.[c] It is not necessary for an *execution creditor*, appearing on a motion under this Act, to produce an affidavit;[d] but the nature and particulars of the claim should, it seems, be authenticated on oath.[e]

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[a] *Cook* v. *Allen*, 2 Dowl. 11; *Braine* v. *Hunt*, ib. 391.

[b] *Cox* v. *Balne*, 2 D. & L. 719.

[c] *Sturgess* v. *Claude*, 1 Dowl. 506; *Roach* v. *Wright*, 8 M. & W. 155. See *Putney* v. *Tring*, 5 M. & W. 426.

[d] *Candy* v. *Maugham*, 7 Sc. N. C. 402.

[e] *Patorni* v. *Campbell*, 12 M. & W. 278.

[f] *Delvalle* v. *Plomer*, 3 Camp. 47.

[g] 1 & 2 Vict. c. 45. See also *Burgh* v. *Schofield*, 9 M. & W. 480; *Beames* v. *Cross*. 4 Dowl. 122; *Haines* v. *Disney*, 2 Scott, 183; 1 Hodges, 189.

[h] *Burgh* v. *Schofield*, 9 M. & W. 479.

[i] *Mutton* v. *Young*, 4 C. B. 371; *Crump* v. *Day*, ib. 760.

[k] *Bragg* v. *Hopkins*, 2 Dowl. 151; *Beale* v. *Overton*, 2 M. & W. 534; 5 Dowl. 599, S. C.

[l] 5 Dowl. 599.

[m] *Cook* v. *Allen*, 2 Dowl. 11.

[n] *Northcote* v. *Beauchamp*, 1 M. & Sc. 158.

[o] *Scott* v. *Lewis*, 2 C. M. & R. 290.

[p] *Isaac* v. *Spilsbury*, 10 Bing. 3; 3 M. & Sc. 341; *Bently* v. *Hook*, 2 Dowl. 339; *ante*, p. 150; Tidd's New Pr. 577.

### *Affidavit.*

In the Q. B.

Between *A. B.* and *C. D.*

*G. P.* of —— in the county of —— officer to the Sheriff of —— maketh oath and saith that under and by virtue of a writ of fieri facias directed to the said Sheriff commanding him that he should &c. (*as in writ*) and indorsed to levy the whole besides —— and by virtue of a warrant of the said Sheriff granted on the said writ he this deponent did on the —— day of —— instant seize certain —— then being in the dwelling-house of the said defendant situate at *M.* within the bailiwick of the said Sheriff and that the said goods chattels &c. now are in the possession of the said Sheriff. And this deponent further saith that on or about the —— day of —— instant he this deponent was served with a written notice of which the following is a true copy [*copy the notice*]. And this deponent further saith that he has made all possible inquiry into the nature of the said claim and is not able to determine to whom the said goods or chattels belong: and he further saith that the above-named plaintiff insists upon the same being sold by the said Sheriff.

Sworn &c. *G. P.*

Appearance, &c., of parties on rule.

No one has a right to be heard, unless he be called on by the rule or summons, though he be, in fact, a claimant; and if he be called in one character, he cannot appear in another.[f] The claimants may appear without taking office copies of the affidavits on which the rule was obtained.[g] Affidavits on showing cause may be sworn at any time before cause is shown.[h] When a new claim is raised, after a *rule nisi* obtained, the Sheriff may make the new claimant a party to the rule, and the Court will enlarge the rule, until the other claimant consent.[i] If the claimant has sustained any special damage by a sale of the goods, or the like, it must be distinctly brought before the Court or the Judge at the time the rule or order is made.[k] The rule or summons is either discharged, in which case the Sheriff is entitled to a *reasonable* time to return the writ before an attachment can issue;[l] or, one or more *issues* are directed to be tried, in which case who is to be plaintiff and who defendant on the record, what admissions are to be made by the defendant, are in the discretion and ordering of the Court or Judge, as may best suit the justice of the case;[a] in general, the claimant is plaintiff and the execution creditor is defendant. The goods are commonly ordered to be sold, and the money brought into Court, to abide the event. An execution creditor's claim may be barred by the Court, as well as that of an adverse claimant.[b] If the Sheriff and the judgment creditor appear, the former to support his rule, the latter to resist the adverse claim, and *the adverse claimant* does not appear, the Sheriff's rule is made absolute, and the adverse claimant is barred as against the Sheriff.[c] An execution creditor, when made defendant, may be compelled to give security for costs, as when he resides out of the jurisdiction of the Court, or is insolvent.[d] If the rule be discharged or summons dismissed, the Sheriff is allowed a reasonable time to return the writ, before an attachment can issue against him.[e] Without the consent of both the execution creditor and the claimant, neither the Court nor Judge has power to dispose of the case *summarily*.[f] In the case cited, the summary jurisdiction was objected to by the execution creditor; an issue was then directed to try the matter in dispute, the execution creditor being made plaintiff. When disposed of in a summary way by consent of parties, the judge's award is *final*.[g]

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[a] *Cook* v. *Allen*, 2 Dowl. 11.

[b] *Donniger* v. *Hineman*, 2 Dowl. 424; *Dobbins* v. *Green*, 2 Dowl. 510; *Bond* v. *Woodhall*, 4 Dowl. 351.

[c] *Levy* v. *Champneys*, 2 Dowl. 454.

[d] *Angus* v. *Wootton*, 3 M. & W. 310.

[e] *Powell* v. *Lock*, 3 Ad. & E. 315; *Webster* v. *Delafield*, 7 C. B. 187.

[f] *Clarke* v. *Lord*, 2 Dowl. 55; but see *Ibbotson* v. *Chandler*, 9 Dowl. 250.

[g] *Mason* v. *Redshaw*, 2 Dowl. 595.

[h] *Braine* v. *Hunt*, 2 Dowl. 391.

[i] *Kirk* v. *Clark*, 4 Dowl. 363.

[k] *Abbott* v. *Richards*, 3 D. & L. 488.

[l] *Rex* v. *Sheriff of Hertfordshire*, 5 Dowl. 144; 2 Har. & Wol. 122.

Summary settlement.

### *Feigned Issue.*[h]

In the Court of Q. B. ["C. P." *or* "Exch." *or in any inferior Court, as the case may be.*]

Middlesex to wit [*or such other county as may be directed*:] Whereas *A. B.* affirms and *C. D.* denies [*here state fully the fact or facts in issue*] and the Lord Chancellor [*or such other Court &c.*] is desirous of ascertaining the truth by the verdict of a jury and both parties pray that the same may be inquired of by the country. Now let a jury &c.

*Or* the assignees of the said *C. B.* affirm and the said *J. P.* denies that they were as such assignees upon the said *C. B.'s* being adjudicated bankrupt entitled to the said goods as against the said *J. P.*[i]

If a rule or order directing the trial of an issue become useless, the Court may discharge it.[k] The costs of all the proceedings

Costs.

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[a] *Bramidge* v. *Adshead*, 2 Dowl. 59.

[b] *Donniger* v. *Hinxman*, 2 Dowl. 428; *Ford* v. *Dilly*, 5 B. & Ad. 885; *Perkins* v. *Benton*, 3 Tyr. 51; *Eveleigh* v. *Salsbury*, 3 Bing. N. C. 298.

[c] *Bowdler* v. *Smith*, 1 Dowl. 418.

[d] *Williams* v. *Crossling*, 4 D. & L. 660; *Deller* v. *Prickett*, 15 Q. B. 1081.

[e] *R.* v. *Sh. of Hertfordshire*, 5 Dowl. 144.

[f] *Curlewis* v. *Pocock*, 5 Dowl. 381.

[g] *Shortridge* v. *Young*, 12 M. & W. 5; *Harrison* v. *Wright*, 13 ib. 820.

[h] This form is given by the 8 & 9 Vict. c. 109, but the adoption of it is not compulsory, *Luard* v. *Butcher*, 2 C. B. 858. An issue under the Interpleader Act is solely for the purpose of informing the conscience of the Court, and the creature of the Court; they will not therefore allow the *jus tertii* to be set up; *Carne* v. *Brice*, 7 M. & W. 183; *Belcher* v. *Patten*, 6 C. B. 618: and see *Chase* v. *Goble*, 3 Sc. N.C. 249. The order regulates the costs as may appear to be just and reasonable; *Lewis* v. *Holding*, ib. 191. No proceedings by way of error, or exception, will lie on this issue. If taken they may be set aside. *King* v. *Simmonds*, 7 Q. B. 316; 1 H. L. C. 775, S.C.; *King* v. *Birch*, ib. 674.

[i] *Belcher* v. *Patten*, 6 C. B. 618.

[k] *Luckin* v. *Simpson*, 8 Scott, 676.

are in the discretion of the Court or the Judge.[a] In the exercise of that discretion, they have laid it down, as a general rule, that if the execution creditor does not appear, he must pay the claimant's costs;[b] if the claimant does not appear, he must pay the execution creditor's costs,[c] but not the Sheriff's.[d] Indeed, as regards the Sheriff, he is not, in general, allowed costs; the reason, generally, assigned for this is, that he is not bound to come to the Court, and if he prefers doing so to taking an indemnity, that is no reason why he should have costs; besides, it is considered, that the statute is of itself sufficiently beneficial to Sheriffs;[e] a better reason may, possibly, be drawn from the practice on applying to the Court to enlarge the time for making his return, when no costs are allowed him; but if he be brought improperly before the Court, the costs of his application for relief will be allowed him. If both the execution creditor and the claimant fail to appear, the Court orders the Sheriff to sell so much of the goods as will defray his poundage and expenses, and to abandon the remainder; and, in addition, protects him from all actions in respect thereof.[f] Where all parties to the rule appear, and no blame appears to attach either to the execution creditor, to the claimant, or to the Sheriff, each party bears his own expenses of the application.[g] As the Sheriff is not entitled to receive, so is he not, in general, liable to pay costs, if he act fairly.[h] But if he do not act fairly, or be guilty of any laches in making his application, as to time, giving notices, or the like;[i] or, if he make no inquiry into the nature of the claim set up;[k] or, if he do not pay the landlord his rent, after proper notice,[l] the Court will make the Sheriff pay the costs of the application, and likewise the costs of any security ordered to be given. Such expense as he may incur, as *agent* of the parties, after his application, will be allowed;[m] and any *extra* expense he may have been put to by obeying the rule of Court directing an issue.[n] So, where the parties come to an arrangement, after an order made under the statute, the Sheriff will be paid, if there be anything to show that their conduct was vexatious.[o] But costs incurred by keeping possession, in consequence of a party refusing to consent to a judge at chambers making an order in the case, no authority for that purpose being given by the statute, are not allowed the Sheriff.[a] If an issue be directed, the costs are either made to abide the event, or are reserved; in the former case, they will fall on the party who fails: in the latter, they will be subsequently arranged, as may appear most just and reasonable. Thus, where they were reserved, and the issue was as to *five* horses, and the plaintiff made out his claim only to *two*, the plaintiff was allowed only a portion of the costs of the issue to be ascertained by the master, and he was held entitled to the costs of the original application, but not to those of the subsequent proceedings to obtain costs, inasmuch as his claim was too large.[b] The Court may adjudicate as to the costs of appearing to the Sheriff's rule, and of an issue directed to be tried under it, although the trial of it has *already* taken place.[c] When an issue is directed to be tried between an execution creditor and a claimant, and the latter refuses to try and abandons his claim, he will be liable to pay the execution creditor's costs down to the time of the claim being abandoned *and* of applying to take the money out of Court.[d] Where the Court ordered a claimant to proceed to trial, upon bringing a sum of money into Court, which he neglected to do, he was held liable to pay as well the costs occasioned by his false claim, as the costs of the application to Court to compel him to pay them, and that, too, although no previous application had been made to him;[e] but the costs should be previously demanded, otherwise the costs of the application will not, in general, be allowed.[f] The Sheriff will be allowed the extra expenses he is put to by obeying the rule of Court directing an issue;[g] and the expenses of a sale effected by the authority of the Court, although it appears on the trial of the issue, that the seizure was wrongful.[h] When the issue is tried, the successful party is entitled, there being no order inconsistent therewith, to the money paid into Court, the costs of trying the issue, and the costs of the application to Court, although he has not applied to the opposite side for their consent to take the money out of Court.[i] "All rules, orders, matters, and decisions, to be made and done in pursuance of this Act, except only the affidavits to be filed, may, together with the declaration in the cause (if any) be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and

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[a] 1 & 2 Will. 4, c. 58, s. 6, and 1 & 2 Vict. c. 45; *Carr* v. *Edwards*, 8 Dowl. 30; *Lewis* v. *Holding*, 3 Sc. N. R. 191.

[b] *Beswick* v. *Thomas*, 5 Dowl. 458; *Tomlinson* v. *Done*, 1 Har. & Wol. 123.

[c] *Bowdler* v. *Smith*, 1 Dowl. 418; *Bryant* v. *Ikey*, ib. 428; *Perkins* v. *Benton*, 3 Tyrw. 51; *Towgood* v. *Morgan*, ib. 52 n.

[d] *Jones* v. *Lewis*, 8 M. & W. 264.

[e] Ibid.; also *West* v. *Rotherham*, 2 Bing. N. R. 527; 2 Scott, 802; *Thompson* v. *Sheddon*, 1 Scott, 697; 1 Hodges, 92; *Bryant* v. *Ikey*, 1 Dowl. 430.

[f] *Eveleigh* v. *Salsbury*, 5 Dowl. 369.

[g] *Morland* v. *Chitty*, 1 Dowl. 520; *Clarke* v. *Lord*, 2 Dowl. 55; ib. 222, 337; *Thompson* v. *Sheddon*, 1 Scott, 697; 1 Hodges, 92.

[h] *Clarke* v. *Lord*, *suprà*.

[i] *Bland* v. *Delano*, 6 Dowl. 293; *Alemore* v. *Adeane*, 3 Dowl. 498; *Beale* v. *Overton*, 5 Dowl. 599; *Braine* v. *Hunt*, 2 Cr. & M. 418; 4 Tyr. 243.

[k] *Bishop* v. *Hinxman*, 2 Dowl. 166; *In re Sheriff of Oxfordshire*, 6 Dowl. 136.

[l] *Clarke* v. *Lord*, *suprà*.

[m] *Dabbs* v. *Humphries*, 1 Scott, 325; 1 Bing. N.C. 412; 3 Dowl. 377; *Underden* v. *Burgess*, 4 Dowl. 104.

[n] *Armitage* v. *Foster*, 1 Har. & Wol. 208.

[o] *Cox* v. *Fenn*, 7 Dowl. 51.

Remedy for.

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[a] *Clark* v. *Chetwode*, 4 Dowl. 635.

[b] *Bowen* v. *Bramidge*, 2 Dowl. 214; *Lewis* v. *Holding*, 3 Sc. N. C. 191; *Carr* v. *Edwards*, 8 Dowl. 30.

[c] *Seaward* v. *Williams*, 1 Dowl. 528.

[d] *Wills* v. *Hopkins*, 3 Dowl. 346.

[e] *Scales* v. *Sargeson*, 3 Dowl. 707.

[f] Ibid.

[g] *Armitage* v. *Foster*, 1 Har. & W. 208.

[h] *Bland* v. *Delano*, 6 Dowl. 293.

[i] *Meredith* v. *Rogers*, 7 Dowl. 596.

effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid *within fifteen days after notice of the taxation, and amount thereof* given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fieri facias* or *capias ad satisfaciendum, adapted to the case,* together with the costs of such entry, and of the execution if by fieri facias; and such writ or writs may bear *teste* on the day of issuing the same, whether in term or vacation; and the Sheriff or other officer executing any such writ shall be entitled to the same fees and no more as upon any similar writ grounded upon a judgment of the Court."[a]

Application for money out of Court.

A party entitled to costs, under the Interpleader Act, may pursue his remedy for their recovery either under that Act or under the 1 & 2 Vict. c. 110, s. 18; if he proceed under the latter Act, he need not enter the order for them of record.[b] Upon an application under an interpleader rule (as to get money out of Court, or the like) an affidavit should be entitled in the original cause.[c] The successful party is entitled to the costs of the application, though cause be shown in the first instance.[d] Where a judge at chambers has, under this Act, directed money to be paid into Court, to abide the event of an issue, and has reserved the question of costs, an application for the money must be made to a judge, and not to the Court.[e]

## SECTION II.

### JUDGMENTS.

Definition of.

JUDGMENTS are the sentences of the law, pronounced by the Court, upon the matter contained in the record.[f] In obtaining the fruits of a judgment, it is often necessary to ask whether it is for the Queen or for a subject? whether it is a judgment after verdict, or one by default? But of these, more hereafter in their proper places. The present inquiry is into the *effect* of a judgment upon the person, goods and chattels, and land of the debtor.

Effect of, at common law.

What was its effect *at common law?* 1. The judgment created no lien upon the *body*. There was no *capias* for the debt or damage of a common person; the party having trusted him only with personal things, had his remedy only on the personal estate; the King had the interest in the body of his subject, and the lord in his feudatory or vassal, to be called out to war, or to labour for him, and therefore none but the King could imprison him.[g] 2. As to *goods and chattels;* the judgment, of itself, did not bind them; because, as the books say, it was in force for a whole year, and it would have been hard that none, against whom judgment was pronounced, should buy or sell during that time. 3. As to the *lands;* the land was not liable to any debt, not only because the debt was contracted upon the personal security, but also that the lord might not have a stranger put upon him, for those only were to enjoy the land who came in by feudal donation. A private judgment, therefore, at common law, created no charge upon the land.[a] But the lands themselves, being held mediately or immediately from the King, were as much subject to the King's demands, by the judgment of his Court, as if there had been a reservation on the original tenure, and therefore, in case of the Crown, *it bound the lands from the time of the record of such debt, before execution issued;*[b] for if they had not determined that the *record* would bind the lands themselves as firmly as if it had been in the feudal patent, it would have happened that the subject, by an alienation of his land, might have defeated the King's execution, which would frequently have happened, since the King was to give notice, before he could seize the land.[c]

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[a] 1 & 2 W. 4, c. 58, s. 7.

[b] *Cetti* v. *Bartlett,* 1 Dowl. N. C. 928.

[c] *Pariente* v. *Pennell,* 7 Sc. N. C. 834.

[d] *Cusel* v. *Pariente,* 8 Sc. N. C. 240.

[e] *Marks* v. *Ridgway,* 1 Exch. 8.

[f] 3 Bl. Com. 395; 1 Inst. 39.

[g] Gilb. Exec. p. 18.

**Under stat. Westm. 2.**

So stood the common law, before the stat. of West. 2, (13 Edw. 1, c. 18,) which says, "When a debt is recovered or acknowledged[d] in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *fieri facias* unto the Sheriff of the lands and goods; or that the Sheriff deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) and the one-half of his land,[e] until the debt be levied according to a reasonable price or extent. And if he be put out of that estate, he shall recover by a writ of *novel disseisin,* and after by a writ of *redisseisin* if need be."[f]

**Effect of upon lands and chattels real.**

As the books say, there was no inconvenience that the judgment in a *private* case should bind the lands from the time of the judgment, as it did before in the King's debts, since they might search the records of the King's Courts for the one as well as for the other. By this stat., a judgment became a *general lien* upon all the debtor's lands, which he then had, or which he might afterwards acquire; this general lien could not be avoided by any subsequent act of the debtor, not even by an alienation for valuable consideration, without notice.[a] As by fiction of law, the judgment had relation back to the essoign or first return day of the term, it affected, retrospectively, *bonâ fide* purchasers for value; the Stat. of Frauds (29 Car. 2, c. 3, ss. 14, 15) therefore provided, that the judgment should bind lands only from the signing thereof. Observe the expression, "*bonâ fide* purchasers for value;" for, as between *creditors*, the law remained as at common law, until the general rule of H. T. 4 Will. 4, c. 3,[b] which declared, "that all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or in vacation, when signed, and shall not have relation to any other day: provided that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*." Under the stat. of Westm. 2, a judgment operated as a *general lien* upon the debtor's land; but under the 1 & 2 Vict. c. 110, s. 13, it operates as a *specific encumbrance*.[c] Now, although a judgment must now be considered, in equity, as equivalent for many purposes to a voluntary charge, yet a judgment creditor is not to be regarded in the light of a purchaser; he has neither *jus in re* nor *jus ad rem*; all that he has, by the judgment, is a lien upon the land.[d] Before the 1 & 2 Vict. c. 110, ss. 11 & 13, a judgment was no lien at law or in equity upon a legal term; and, *until execution*, the debtor might assign it at his pleasure;[e] but it seems to be generally admitted, that all leaseholds are now bound by the judgment, equally with freeholds.[f] From what has been said, we may conclude—1. That at common law, in the King's case, a judgment bound the debtor's land from the time of the record of such debt. 2. That at common law a private judgment created no charge upon the land. 3. That under the statute of Westm. 2, a judgment became a *general lien* upon all the lands which the debtor had at the time of entering up the judgment, and upon all those which he subsequently acquired. 4. That under the 1 & 2 Vict. c. 110, a judgment became a *specific lien or incumbrance*, both at law and in equity, upon all the land which the debtor had, at the time of entering up such judgment, or at any time afterwards, or over which he then, or at any time afterwards, had a disposing power. 5. That before the 1 & 2 Vict. c. 110, a judgment was no lien at law or in equity upon any leasehold interest; but that, under that Act, such an interest is bound by the judgment, equally with freeholds. As to the Statute of Frauds, in respect of lands.

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[a] See 3 Rep. 11; Dyer, 89, 49, 344; *Giles* v. *Grover,* 9 Bing. 285: and see the remarks hereafter upon the Stat. of West. 2, and the 1 & 2 Vict. c. 110.

[b] *Herbert's ca.,* 3 Rep. 12. *Debts of record* bind the debtor's land from the time of his becoming in debt to the Queen; 2 Roll. Abr. 156 (B.), pl. 1; 2 Wms. Saund. 70*e.* *Debts not of record* bind his lands from the time they are entered into; 33 H. 8, c. 39; *Giles* v. *Grover,* 9 Bing. 285.

[c] Gilb. Exec. p. 8: and see *Rex* v. *Allnutt,* 16 East, 279; *Swain* v. *Morland,* 1 B. & B. 370; 2 Wms. Saund. 69, and 1 ib. 219*h.*

[d] That is, *ad invitum,* or by confession, *Doe* v. *Carter,* 8 T. R. 61.

[e] This *moiety* of the land was extended to the *whole* by 1 & 2 Vict. c. 110, s. 11.

[f] As to the legal import of the word *lands,* see *post,* "Elegit."

Trust estate in lands.

The lands of *cestui-que use* were made liable to execution by 1 Rich. 3, c. 1; but when *uses* came to be executed, and a new estate arose, under the denomination of *trust* (under the 27 H. 8, c. 10), the 29 Car. 2, c. 3, s. 10, became necessary. It enacts, that it shall be lawful for every Sheriff or other officer, to whom any writ or precept is directed, at the suit of any person or persons of, for, and upon any judgment, statute, or recognisance, to do, make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons are in any manner seised or possessed in trust for him against whom execution is so sued, like as the Sheriff or other officer might or ought to have done, if the said party against whom execution is so sued had been seised of such lands, &c. *of such estate as they are seised of in trust for him at the time of the said execution sued;* which lands, &c. by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; and then provides that the trust shall be assets in the hands of the heir.[a] This was essentially altered, especially as to the time when the judgment affected the land, by the 1 & 2 Vict. c. 110, s. 11, which enacts that, "it shall be lawful for the Sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed at the suit of any person, upon any judgment which at the time appointed for the commencement of this Act shall have been recovered, or shall be thereafter recovered in any action in any of Her Majesty's Superior Courts at W., to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, *or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment or at any time afterwards*, or over which such person shall, at the time of entering up such judgment or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the Sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity: Provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform and render to the lord of the manor, or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform and render in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments and the value of such services as well as the amount of the judgment shall have been levied: Provided also, that as against purchasers, mortgagees or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this act had not passed."

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[a] 2 Cruise's Dig. 49; *Rollesten* v. *Morton*, 1 Dru. & War. 195; Prideaux on Judgments, p. 10, 77: and see *Whitworth* v. *Gaugain*, 3 Hare, 416.

[b] Re-enacted by R. G. Hil. T. 1853, r. 56: and see *Robinson* v. *Tonge*, 3 P. Wms. 398.

[c] *Rollesten* v. *Morton*, 1 Dru. & War. 195.

[d] *Brace* v. *Duchess of Marlborough* 2 P. Wms. 490.

[e] *Shirley* v. *Watts*, 3 Atk. 200; *Forth* v. *Duke of Norfolk*, 4 Mad. 506; *Burdon* v. *Kennedy*, 3 Atk. 739.

[f] Sugd. V. & P 382, &c.; 5 Jarm. Conv. (edit. Sweet) 48: and see 1 Dru. & War. 182.

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[a] This section does not affect any equitable estate of which the debtor is not *sole* owner; *Doe* v. *Greenhill*, 4 B. & A. 684; *Forth* v. *Duke of Norfolk*, 4 Mad. 504: see also *Harris* v. *Booker*, 4 Bing. 96; nor an equity of redemption, see *post*, "Elegit."

Effect of judgment after contract of sale.

It often happens that a creditor obtains a judgment against his debtor, *after* the latter has *contracted* bonâ fide and for valuable consideration to sell his land, but before actual conveyance. Now, it is a familiar rule of equity, that from the date of the contract the vendor is a trustee of the estate for the purchaser, and the latter a trustee for the former, of the purchase-money. Hence, it would seem to follow, that such a judgment cannot impede the progress of the legal estate to the purchaser. But, the authorities go far to show, that if the purchaser has notice of the judgment, before the payment of the whole or part of his purchase-money, the judgment will operate as a lien upon the money so unpaid.[a]

After trust for sale.

The same, as a general rule, would seem to apply to a judgment after trust for sale.[b]

After mortgage.

So, a judgment entered up against a mortgagee, *after* the mortgage, will operate, in equity, as a lien upon the surplus monies in the hands of the mortgagee, arising from a sale under a power contained in the mortgage deed.[c]

Upon a power of appointment.

Before the 1 & 2 Vict. c. 110, in consequence of the rule of law that where a power is executed, the person taking under it takes under him who created the power, and not under him who executes it, an appointment, under a power exercisable by the donee for his own benefit, without the assent of any other person, defeated a judgment entered up against him between the creation and the execution of the power;[d] but a judgment cannot now be so defeated.

Upon goods and chattels.

By the common law, goods and chattels were bound from the time of the *teste* of the writ of execution.[e] By the Statute of Frauds, as between subject and subject, this was altered to the time when the *writ of execution should be delivered to the Sheriff, Under-sheriff, or Coroner, to be executed*:[f] when that takes place, the goods are, by force of the statute, immediately attendant to satisfy the judgment. In other words, they are *bound* by the delivery of the writ; not that the property in the goods is altered by the delivery of the writ,[a] (for this does not take place until sale,[b]) nor are they absolutely bound in all cases,[c] as in the case of bankruptcy, before sale.[d] The meaning of the term *bound* is, that the execution creditor thereby obtains what has been called a *quasi lien* upon it; and if the debtor transfer the goods after the delivery of the writ to the Sheriff (which he may do), the Sheriff must execute the writ upon them, although in the hands of a *bonâ fide* purchaser, except the transfer took place in *market overt.* If the transfer did, in truth, take place in market overt, the right of the Sheriff ceased altogether.[e] As regards Crown process, the *teste* of the extent, and not the delivery to the Sheriff, is the time when the goods become bound; the Crown not being named in the Statute of Frauds.[f] A sequestration seems to be on the footing of an execution at common law, and to bind from the time of awarding the commission.[g]

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[a] *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 282; *Forth* v. *Duke of Norfolk*, 4 Mad. 503; Sugd. V. & P. 390.

[b] *Vide* 2 Sugd. V. & P. 388, 389, 11th edit.

[c] See *Forth* v. *Duke of Norfolk*, 4 Mad. 506; *Clare* v. *Wood*, 4 Hare, 81.

[d] *Doe* d. *Wigan* v. *Jones*, 10 B. & C. 459.

[e] 1 Wms. Saund. 219 g, n. (*t*); *Giles* v. *Grover*, 9 Bing. 285.

[f] Or to his deputy, under 3 & 4 Will. 4, c. 42, s. 20; *Woodland* v. *Fuller*, 11 Ad. & Ed. 867.

**Crown process.**

**Sequestration.**

**Relation of judgments.**

The doctrine of judgments relating to the essoign or first return day of term, though signed after, no longer exists; for "all judgments, whether interlocutory or final, shall be entered of record, of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the Court, or a judge, to order a judgment to be entered *nunc pro tunc.*"[h] Because of the difficulty of finding out such judgments, and the confusion and mischief resulting therefrom, especially to purchasers and mortgagees, the legislature required them to be docketed:[i] and now they must be *registered*, from time to time, as prescribed by the statutes referred to below; otherwise they will not affect any lands, &c., as

**Registration of judgments.**

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[a] *Payne* v. *Drewe*, 4 East, 522; *Rex* v. *Allnutt*, 16 ib. 282; *Lucas* v. *Nockells*, 10 Bing. 182; *Giles* v. *Grover*, 9 ib. 128; *Samuel* v. *Duke*, 3 M. & W. 630; *Woodland* v. *Fuller*, *suprà*: and see *Wheatley* v. *Lane*, 1 Wms. Saund. 219 *g*, n. (*t*).

[b] *Giles* v. *Grover*, 9 Bing. 128.

[c] *Smallcomb* v. *Buckingham*, 3 Salk. 159.

[d] 12 & 13 Vict. c. 106, s. 133; *Hutton* v. *Cooper*, 6 Exch. 162.

[e] *Samuel* v. *Duke*, *suprà*. In *Woodland* v. *Fuller*, it was contended in vain that a *vesting order*, under 1 & 2 Vict. c. 110, s. 37, had the effect of a *sale* in market overt. In *Harding* v. *Hall*, 10 M. & W. 47, Parke, B., is reported to have used these words:—"The only meaning of the words being bound by the delivery of the writ is, that notwithstanding a sale of them afterwards, *no property passed to the purchaser.*" There must be a mistake in the report.

[f] See *Rex* v. *Allnutt*, 16 East, 282; *Giles* v. *Grover*, *suprà*; *Wheatley* v. *Lane*, *suprà*; *R.* v. *Edwards*, 9 Ex. 32.

[g] *Burdett* v. *Rockley*, 1 Vern. 58; *Payne* v. *Drewe*, 4 East, 536.

[h] Reg. Gen. Hil. T. 1853, r. 56; Reg. Gen. (*Plead.*) Hil. T. 1853, r. 32; *Greenway* v. *Fisher*, 7 B. & C. 436; *Cumber* v. *Wane*, 1 Smith's L. C. 146, as to such an entry; and *Miles* v. *Bough*, 3 D. & L. 109. The 17 Car. 2, c. 8, s. 1, enacts "that in all actions personal, real or mixed, the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict." This is re-enacted by the Common Law Procedure Act [15 & 16 Vict. c. 76, s. 139]. When, therefore, a party dies after verdict and before judgment, a judgment entered within that time binds the property as if the party had been alive, *Burnett* v. *Holden*, 1 Lev. 277; *Saunders* v. *M'Gowran*, 12 M. & W. 224; *Freeman* v. *Tranah*, 12 C. B. 406.

[i] 4 & 5 W. & M. c 20, made perpetual by 7 & 8 Will. 3, c. 36.

to purchasers, mortgagees, or creditors, otherwise than as before the act.[a] A judgment, not registered, has no preference against heirs, executors, or administrators.[b] These later statutes also provide in the case of purchasers and mortgagees, *without notice* of judgment, that such judgment, even though registered, shall not bind any lands, &c., or any interest therein, otherwise than a docketed judgment would have done before, and that even *notice* of such judgment, &c., shall not affect such persons, unless and until the memorandum or minute be left with the senior master of the C. B.[c] To affect purchasers or mortgagees, Crown judgments must also be registered.[d] Where, after registry, the defendant was taken in execution, and a purchaser of his realty, because of the registry, refused to complete, the Court of Q. B. ordered the plaintiff's attorney to attend the senior master of C. B. and to consent that an entry of the arrest be made in the Register book.[e]

Registration of judgments, &c., as regards lands, &c., in the counties of *York and Middlesex*, is enjoined and regulated by the 5 & 6 Ann. c. 18, s. 4 (West Riding); 6 Ann. c. 35 (East Riding and Kingston-upon-Hull); 7 Ann. c. 20 (Middlesex); and 8 Geo. 2, c. 6 (North Riding). They declare, in almost the same words, that no judgment, statute, or recognizance (except Crown judgments, &c.) shall affect or bind any lands, &c., unless a memorial of such judgment, &c., shall be entered. In all, except the *Middlesex* Acts, it is provided that an entry within a prescribed period shall, by relation, have the effect of a registration in the first instance; and the judgment, a memorial of which has been so registered, will bind *all the lands that the defendant had at the time of signing thereof*, except copyhold estates, leases at a rack-rent, and leases not exceeding twenty-one years, when the actual possession and occupation goes along with the lease. The general design of these Registry Acts is to protect persons taking, by representation, as heirs, executors, or administrators, the property of another, subject to such other person's liabilities; or persons taking an interest by purchase, or mortgage; and not to apply to judgments obtained against the party himself; in other words, "as between the parties it is not more or less a judgment because it is not registered." Upon this principle it was held that a judgment obtained against an executor (before the 2 & 3 Vict. c. 11) was entitled to preference, in the administration of the testator's estate, over simple contract debts, though not docketed pursuant to the 4 & 5 W. & M. c. 20.[f]

**Effect of decrees, orders, rules of Court, &c.**

By the 1 & 2 Vict. c. 110, s. 18, "all decrees and orders of

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[a] What kind of interest it affects is fully explained in 3 & 4 Vict. c. 82: see 1 Vict, c. 110, s. 19, and 2 Vict. c. 11, ss. 2, 4; *Harris* v. *Davison*, 15 Sim. 128; Sugd. V. & P. ch. 12, s. 27.

[b] *Landon* v. *Ferguson*, 3 Russ. 349; Wms. Exors. 859; *Jeffreson* v. *Morton*, 2 Wms. Saund. 9 *d*, n. (*e*); *Gaunt* v. *Taylor*, 3 Sc. N. C. 714.

[c] 3 & 4 Vict. c. 82, s. 2.

[d] 2 & 3 Vict. c. 11, s. 8.

[e] *Lewis* v. *Dyson*, 21 L. J. 194. (Q.B.)

[f] *Gaunt* v. *Taylor*, 3 Sc. N. C. 710. A registration of the *issue* is not sufficient. *Hopwood* v. *Watts*, 5 B. & Ad. 1056; *Braithwaite* v. *Watts*, 2 Cr. & J. 319.

Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses shall be payable to any person, *shall have the effect of judgments in the superior Courts of Common Law*,[a] and the persons to whom any such monies or costs, charges or expenses shall be payable, shall be deemed judgment creditors within the meaning of this Act, and all powers hereby given to the judges of the superior Courts of Common Law, with respect to matters depending in the same Courts, shall and may be exercised by Courts of Equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges or expenses are by such orders or rules respectively directed to be paid." But "no order of any judge as to any stock, funds, annuities or shares[b] standing in the name of the accountant-general of the Court of Chancery, or the accountant-general of the Court of Exchequer, or as to the interest, dividends or annual produce thereof, shall prevent the Governor and Company of the Bank of England or any public company from permitting any transfer of such stocks, funds, annuities or shares, on payment of the interest, dividends or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or *shall have any greater effect than if such debtor had charged such stock*, funds, annuities or shares, or the interest, dividends or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order."[c] In other words, it affects the *debtor's interest* alone, just as if by his own act and deed he himself had charged it; such order neither affecting the Bank nor prior incumbrances, nor any other interest but his own.[d] A Judge's order, under 6 & 7 Vict. c. 73, s. 43 (Attorney's Act), for entering up judgment for the amount of the Master's allocatur, has the same force as a rule of Court under 1 & 2 Vict. c. 110.[a] A consent rule in ejectment, whereby upon a certain event either party was to pay costs, was held to be an order for payment of money within the 1 & 2 Vict. c. 110, s. 18, and after the Master's allocatur execution might issue.[b] When a rule of Court for the payment of money has the effect of a judgment, execution may issue at once.[c] So assignees, and creditors who have proved under a petition of Bankruptcy, are to be deemed judgment creditors, and the Court is to grant a certificate thereof, which has the effect of a judgment of a superior Court at Westminster.[d] A judgment, &c., removed from an *inferior* Court, has the same force, charge, and effect, as a judgment, &c., of a superior Court, except in this, that a judgment, &c., so removed does not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, any further than the same would have done if the same had remained in the Court below, unless and *until a writ of execution thereon shall be actually put into the hands of the Sheriff or other officer appointed to execute the same.*[e]

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[a] See *Farmer* v. *Mottram*, 1 D. & L. 781; *In re Spooner*, 5 D. & L. 310; *Doe* d. *Smith* v. *Roe*, 6 ib. 544; *In re Harvey*, 14 Q. B. 404. An order may be granted before the time for moving to set aside an award has expired, *Hare* v. *Fleay*, 11 C. B. 472.

[b] The E. I. Co. granted to *C. D.* a pension; held, that this was not chargeable with a judgment debt by a judge's order under this act. *Morris* v. *Manesty*, 7 Q. B. 674. As to the power of the Court to charge retiring pension of a Master in Chancery payable out of the suitors' fund, see *Witham* v. *Lynch*, 1 Exch. 399; the stock, &c., must be standing in the parties' "own right," 1 & 2 Vict. c. 110, s. 14; *Fuller* v. *Earle*, 7 Ex. 796.

[c] 3 & 4. Vict. c. 82, s. 1: and see *Fowler* v. *Churchill*, 11 M. & W. 61; *Churchill* v. *Bank of England*, ib. 324; *Rogers* v. *Holloway*, 6 Sc. N. R. 274. A charging order cannot be made by a judge in equity, only by a judge at common law. But a Court of Equity will make a *stop order* as auxiliary thereto. As to the necessity of registering these *quasi* judgments, see 2 Sugd. V. & P. 404, 407.

[d] *Hulbes* v. *Day*, 10 Sim. 46; an *ex parte order* under 1 & 2 Vict. c. 110, s. 15, seems to have the effect of a *distringas*, until it be made absolute or discharged.

Judgments removed from *inferior* Court.

Statutes staple, revenue bonds, &c.

Statutes merchant, statutes staple, and recognizances, in the nature of statutes staple, are wholly disused;[f] but it must be kept in mind, that the 33 Hen. 8, c. 39, s. 50, declares all obligations and specialties made to the Queen, or to her use, for any cause, to be of the same nature, kind, quality, force, and effect, as statutes staple.[g] What, then, is a statute staple? and what is its nature, kind, quality, force, and effect? The statute staple is of two sorts: the one by force of the 27 Edw. 3, st. 2, c. 9; the other, by force of the 23 Hen. 8, c. 6.[h] The former is an obligation of record, acknowledged before the mayor of the staple, in the presence of one of the constables of the same staple, and is sealed with the seal of the staple, and the seal of the party: it is only between merchants of the same staple, and for merchandize of the same staple. The other is likewise an obligation of record, and of the same nature and force as the former, as regards the execution of it; but it is acknowledged before one of the chief justices, and in their absence (out of term), before the Mayor (of the staple at Westminster) and the Recorder of London, and is sealed with three seals; that of the conusor, that of the Queen, and with that of one of the said justices, or of the mayor and recorder.[f] Both are, therefore, debts of record to the Queen; and, being so, they fall for the purposes of execution within the same rules; recoverable by scire facias, by extent, or by information on the record itself;[a] and *bind* the property, real and personal, of the debtor, as in other cases of debts of record to the Queen.[b]

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[a] *Griffiths* v. *Hughes*, 16 M. & W. 809.

[b] *Doe* d. *Pennington* v. *Barrett*, 4 D. & L. 755.

[c] *Doe* d. *Harrison* v. *Hampson*, 4 C. B. 745.

[d] 12 & 13 Vict. c. 106, s. 257.

[e] 1 & 2 Vict. 110, s. 22. As to executions out of the Courts at Westminster on judgments in the C. P. at Lancaster, see 4 & 5 Will. 4, c. 62, s. 31; 15 & 16 Vict. c. 76, ss. 129, 134. Stannaries Courts in Cornwall, 6 & 7 Will. 4, c. 106, s. 11. The Courts of the Counties Palatine are original *superior* Courts, *Peacock* v. *Bell*, 1 Wms. Saund. 73.

[f] See Dalt. Sh. 123; 1 Steph. Com. 286; 2 Wms. Saund. 70 *a*; 2 Wms. Exors. 863; Burt. Comp. sect. 869; Bac. Abr. Executor, 331. The word "*Recognizance*" does not of itself import a record; it is not a record until enrolment, *Glynn* v. *Thorpe*, 1 B. & A. 153.

[g] See for the construction of this Act, *Giles* v. *Grover*, 9 Bing. 128.

[h] Explained and amended by 8 Geo. 1, c. 25.

When judgment final.

Time of signing.

Enrolment.

Revival of.

Death after verdict.

*The Common Law Procedure Act*, 1852, introduced some important alterations as to judgments. In the first place, it makes the judgment by default *final* in all actions where the plaintiff seeks to recover a debt or liquidated demand in money.[c] Again, in all such actions the judgment is to award the amount to the plaintiff generally, and not as a debt or damages as before.[d] The Act, however, saves certain provisions of the 8 & 9 W. 3, c. 11.[e] With respect to verdicts obtained, whether in term,[f] or *out of term*,[g] the successful party is entitled to execution in *fourteen* days, unless a Judge or the Court shall order it to issue at an earlier or later period with or without terms. *In Ejectment*, upon a finding for the claimant, judgment may be signed and execution issue within such time, not exceeding the fifth day in term after the verdict, as the Court or Judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen; and upon a finding for the defendant, judgment may be signed and execution issue for the costs at the same period.[h] The same Act also declares that it shall not be necessary before issuing execution upon any judgment to enter the proceedings upon any roll, but an incipitur thereof may be made upon paper, shortly describing the nature of the judgment, and judgment may be thereupon signed, costs taxed, and execution issued: Provided, nevertheless, that if a formal entry on the roll be necessary for evidence or error, such entry may be made.[i] This is inserted under the head *ejectment* in the Act, but seems to apply to all cases. The *effect* of a judgment in ejectment is not altered by this Act.[k] There are also some very important alterations in the same Act with respect to *proceedings to revive*.[l] Its chief provisions are, that during the life of the parties execution may issue, without a revival of the judgment, at any time within six years. When revival is necessary, it may be done by a *writ of Revivor*, or with leave of the Court or a judge by suggestion. The writ is directed to the party and not to the Sheriff. If unexecuted, it does not remain in force for more than one year from its teste, unless renewed as directed by the Act. To revive a judgment less than *ten* years old, the writ is allowed without any rule or order; if more than *ten*, not without a rule or order; if more than *fifteen*, not without a rule to show cause. The death of either party between the verdict and the judgment, cannot be alleged as error, so as such judgment be entered within two terms after such verdict.[m]

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[a] *Attorney-General* v. *Sewell*, 4 M. & W. 86.

[b] *Ante*, p. 161. *Giles* v. *Grover*, 9 Bing. 128; 2 Wms. Saund. 70 *e*; *R.* v. *Ellis*, 4 Ex. 652; 6 ib. 921.

[c] 15 & 16 Vict. c. 76, s. 93.

[d] Sect. 95.

[e] Sect. 96.

[f] R. G. Hil. T. 1853, r. 57.

[g] Sect. 120.

[h] Sects. 185, 186.

[i] Sect. 206.

[k] Sect. 207.

[l] Sects. 128, 134. See *Boodle* v. *Davis*, 8 Exch. 351.

[m] *Ante*, p. 161, n. (*h*).

## SECTION III.

## EXECUTION.

What it is. *Executio est fructus et finis legis.* "Execution in our law (according to *Dalton*) signifieth the last performance of an act, as of a judgment, statute, or the like, and is of two sorts; one *final*, another with a *quousque*, &c. An execution final is when the defendant's lands are extended, or his goods sold and delivered to the plaintiff, who, accepting this in satisfaction, ends the suit. An execution with a *quousque*, and not final, as in the case of a *capias ad satisfaciendum*, where the body is taken to the intent to satisfie the plaintiff; but is no satisfaction but a pledge for the debt. Neither is the party's imprisonment absolute, but until he doth satisfie or agree with the plaintiff."[a] Sir W. Blackstone describes it as a "putting the sentence of the law in force." The word is generally used to signify, by a figure of speech, a judicial writ grounded on the judgment of the Court whence the writ issues. No one seems to have described its rise, progress, properties, and peculiarities so faithfully as the Lord Ch. Baron *Gilbert;* and from that rich repository of learning it is my intention to draw most abundantly. Some doubt the authenticity of the *Law of Executions* bearing his name. The book is one of great intrinsic merit, it has received the sanction of the ablest men that ever adorned the judicial seat, and it bears, undoubtedly, on its own pages the impress of his clear and vigorous understanding. *Lord Holt* is reported to have said, "If we see one against whom there is a judgment of this Court walk in *Westminster Hall*, we may send our officer to take him up, if the plaintiff desire it, without a writ of execution." [b] Without writ. That the Court may execute a judgment, without a writ of execution, at least in W$^{r}$. Hall, is a proposition I am not prepared to deny; yet the possession of this supposed power is one thing, the exercise of it another; and except that our knowledge of the claim to it may lead us to a more just notion of what execution in the abstract means, the decision (if truly reported, and true to the fullest extent) seems to be of little or no practical value. Original nature of. "The antient executions (says *Gilbert*[c]) are to be distinguished, as they were in the king's Court, and in the Courts of inferior lords. In the king's Court they could levy the money itself upon the party against whom the judgment was given; in the lord's Court they could only levy distresses, a pain to force obedience to the lord's commands; and whether they were justly levied or not, was to be reconsidered again in the king's Court.[d] For the lord only taking the distress as a pain, and not being able to sell without special custom, it could be no prejudice to such execution to reconsider the reasonableness of such caption, by putting in other pledges.[e] But in the king's Court they did not take goods as a mere pain to make the party appear, as they did in the Court below.[a] 1. Because the king's Court immediately altered the property, which the lord's could not; and the reason why the lord's could not was, that when the lord commanded the party to recover he was subject to a writ of false judgment, and therefore he himself was to have the custody of such goods, in order to return them in case it was recovered. 2. If on the king's writ, they should only have taken the goods as a pledge, on the return, that pledge would have been forfeited to the king, though they were not to the lord in the Court below; and on such forfeiture the goods must *de gratiâ* have been given to the party for satisfaction, if they had not been immediately levied to the party's use, for such forfeitures were not re-examinable as in the lords' Courts, and therefore created a forfeiture immediately. 3. The judgment was that the plaintiff *recuperet* the money adjudged to him, and therefore the best and most direct way of levying the money was by bringing the money itself into Court for the use of the parties. In the king's Court, between party and party, the execution was only upon the goods, because the debtor was trusted only upon his personal security, and pledges were taken on such contracts by other personal goods, as pledges, or by means of personal security, as bodies; and the judgments being in pursuance of the contract, were only to recover a personal thing.[b] But in the king's case, an execution issued, not only against the goods and chattels, but against the lands, and therefore they considered the debtor, not merely as bound in person, but as a feudatory, who held mediately or immediately from the king, and therefore, holding what he had from the king, he was from thence to satisfy what he owed to the king. And being considered as public treasure it was not to be lost; if the subject had any thing, they first tried twice to levy on his personal estate, before they seized the lands. It is generally said, in the books,[c] that there was only a *lev. fa.* and a *fi. fa.* for the subject, in the case of an execution, which is true; for it is plain that the *capias* and *elegit* comes in by the statutes.[d] But at common law they awarded execution sometimes by the words of *habeas denarios, facias denarios, fieri facias denarios, levari facias denarios*;[e] and all these forms were used at first indistinctly, as words tantamount to the same thing! this appears even in the king's case, by the several forms yet extant on record; but afterwards they began to distinguish the writ into two several forms, viz. the *fi. fa.* and the *lev. fa.*, and confined the writs to be used in distinct cases. 1st. The *levari* was in the Courts below, for there they could not word it by a *fieri* in process, because they could not alter property in the writ; and therefore it was a vain thing to conceive a writ in such a manner as could not be exe-

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[a] Dalt. Sh. ch. 24.

[b] Anon. 7 Mod. 52.

[c] Gilb. Exon. 1.

[d] Dalt. ch. 111; Keilw. 106.

[e] Kitch. 226.

Writs of execution at common law.

Levari facias.

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[a] Dalt. ch. 111.

[b] 3 Co. 11, b. 12.

[c] 2 Inst. 394, 395; Mo. 367, 662, 668.

[d] See Hob. 56.

[e] Have the money; make the money; cause the money to be made; cause the money to be levied; 3 Co. 11, 12; 2 Bulst. 68, 99; Finch, 471.

cuted; and if there was a sale, as sometimes there was, by a grant from the king, or now by prescription; yet such grants coming in after the process were settled in the inferior Courts; the *levari* is the form of the execution, and they have no *fi. fa.* But, however, that the goods might not be taken as a pain without any relief to the subject, there is a writ *de exec. judicii*, on which writ the Sheriff has authority to sell the distresses he has taken on the *levari*, or to take and sell the goods of such recovery; and the reason of this writ was to remedy any collusion between the Sheriff and the recoveree, or the inferior lord and recoveree; for when they had taken the goods, they would either keep or restore them as they saw cause, and make the execution subservient to their own benefit, and not, as it was intended, a pain to make the party perform the judgment; and for this reason the writ *de fi. fa. exec.* was granted to compel the Sheriff to make execution of the goods he had in his hands, and the judgment having given him authority to levy, the writ gives him power to sell what is levied; but if there be no such judgment he must return that on the *alias* and *pluries*; for the writ is not judicial or issuing from any record, but is an original writ, which gives him authority to execute such judgment by sale. There was the same sort of writ at common law, which was called a *si recognoscat*, which was, where there was a recognizance in the Sheriff's Court, that it should be levied *de bonis et catallis*, and thereby give authority to sell, which were the words the *levari* made use of in the process of their Court. In the *alias* the phrase was *fi. fa. exec. juxta ten. mandati nostri*; and sometimes they had an original process by *distringas*, which was indifferently made use of with the *levari*; but the *distringas* being the king's writ, if the money was not paid the goods were forfeited, and therefore they had a *venditioni exponas*; and though Fitzherbert puts a *quære* on it, yet it seems to be law; because on every *distringas* on the writ of the king, if the matter was not performed for which the *distringas* was made, the goods were forfeited, and they did not in this writ, as in the ancient process of the king, make use of the words *distringas, levari, et fieri.*

"2ndly, the *levari*[a] in the Courts above was either upon a recognizance or in the king's process; the *levari* was particularly distinguished upon the recognizance, because the form of the recognizance was that it should be levied *de bonis et catallis, terris et tenementis, ad quascunque manus devenerunt*,[b] and therefore the particular words *levari* are chosen upon such recognizance because the words *fieri* would not have extended to the lands as well as the goods, since he was not to alter the property of the lands themselves on such process, but only to levy it out of the profits. In

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[a] Cro. Jac. 450; Dy. 306; Plow. 441.

[b] Of the goods and chattels, lands and tenements, into whosesoever hands they come; F. N. B. 598, 594.

**Execution for the Crown.**

the king's case the first process runs by way of *habeas*, which was one of the words anciently used in executions, and they chose this word, which was an expression of a summons to give notice to *have* the money, and likewise gave authority to the Sheriff to levy it, that the debtor might not make away the goods to defraud the king; for by Magna Charta the land of the debtor could not be seized nor his security sued, if there were goods and chattels of the principal to satisfy. In case of the king the second process was a *levari*, and they made use of this word because the process was to run not only to the goods but on the profits of the land itself, and herein likewise they inserted the *capias* on the person, because it appeared on the Sheriff's return on the summonitor's process that he had no goods to satisfy the debt; and in that case the body was liable by the prerogative of the king. For though in a private case the body was not liable to satisfy the debt, because the king had a right to the service of his body, yet when it was for the sake of the public, as for embezzling the public treasure, the body was liable. The third process in behalf of the crown was extending the lands: for the lands themselves being held mediately or immediately from the king, were as much subject to the king's demands by the judgment of his Court as if there had been a reservation on the original tenure, and therefore bound the lands from the time of the record of such debt before the execution issued; for if they had not determined that the record would have bound the lands themselves as firmly as if it had been in the feudal patent, then it would have happened that the subject, by an alienation of his land, might have defeated the king's execution, which must frequently happen, since the king was to give notice before he could seize the land itself.

**Fieri facias.**

"3rdly, having thus considered the *levari*, the last thing to be mentioned is the *fi. fa.* upon the judgment at the party's suit; and here the words *fi. fa.* were chosen to distinguish this sort of execution, because it was only *de bonis et catallis*, and not to be raised from the profits of the lands themselves; and the words *fi. fa.* in the several ancient sorts of executions were the properest to be made use of on a judgment against the party, for the goods only were liable to an execution, and from henceforward they never sent execution against the goods by the words *levari*, but on the *fieri* only, and the word *levari* on the *bonis et catallis* became obsolete, unless in the case of a *si recognoscat*, where, for the reason above-mentioned, it remains till this day. And Westm. 2, c. 18, which gave the *elegit*, having mentioned the election to be on the *fieri facias*, has affirmed this distinction, and pinned down the difference then taken, and has made the *fieri facias* a specific writ for an execution on the judgment, and the *levari* for the recognizance. But the *levari* remains for the recognizance notwithstanding the wording of the statute; because the *levari* is to charge the profits of the land as well as the goods and chattels, and therefore process on the recognizance could not be by *fi. fa.* only. Having thus considered the nature of the ancient executions, we come now

Time for execution at common law.

to the time in which judgments at common law were to be executed and how revived.[a] A man by judgment authenticated his debt, and it gave an authority to the party to sue his execution within a year and a day; but if he did not, it was presumed to be paid, and after that time the law allowed him to plead payment and a release of such recorded debt; and the reason was, because all judgments were to be rendered effectual within a competent time, which was the same as in the case of non-claims, viz. a year and a day; and therefore the pledges that were put in for the principal *adstandum recto*[b] were amerciable, as well as the principal, during the year and the day; and those amercements were issued in process by the officers during that time by *lev. fa.* in the lord's Court and *fi. fa.* in the king's Court. And if the party had paid the money and satisfied the amercements, the judgment stood in full force, and the party could plead nothing on an execution taken out after such payment; because the judgments and amercements did not appear to be satisfied, and therefore the party was put to his *audita querela*, in which the execution was discharged. But the judgment still remained in force, as not being annulled by the return of a regular execution or by the entry of an acknowledgment of satisfaction upon record. But at common law neither the party nor his pledges stood to any execution sued out or amercement affeered within the year and day. And therefore if the party had not got execution, nor the amercement affeered by the Court, nor the amercement levied by the officer, there was an end of all proceedings by way of execution on the same judgment. But they might bring an action of debt on that judgment, or debt for that amercement, if it were affeered within the year; and in such new actions there were new pledges to be put in upon the default of the defendant's appearing on the first summons, and the defendant might plead a release, because under seal subsequent to the judgment, as a bar to the action upon that judgment, and the plaintiff could have no execution at common law. After the year was out the defendant could not have pleaded payment, for that would have been putting it on the oaths of men to overturn the validity of the judgment.[c] This time of limitation of judgment was not only in personal but real actions; for though the judgment on a real action settled the right of the land for ever, as in the personal it did the right of the thing in demand, yet that judgment could not lie dormant for ever, to be executed at any time; for then dormant judgments would overreach conveyances between the parties, and therefore there was but a year's time to execute such judgment, which judgment overreached all conveyances and forced the party to his *audita querela*. But after the year the judgment overreached nothing, but he was put to his *sci. fa.* on that judgment and not to his action, for the right of the land had been already determined, and therefore it was only to revive the determination touching the lands, unless something had been done by intermediate conveyances. And so upon annuities, which were formed upon the model of freeholds, the right of such annuity was settled in one writ and revived by *scire facias;* but in debt, if the judgment was not executed, the debt was presumed to be paid when the judgment lost its force, and therefore the common law gave no *scire facias* but a new action."

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[a] See p. 165.

[b] To have justice.

[c] 22 Edw. 4, 6.

It has been stated in a former page (p. 165), how, under the *Common Law Procedure Act*, 1852, judgments are to be *revived;* and, therefore, a bare reference to it will suffice.

**General maxims.**

There are a few general maxims, respecting writs of execution, which conveniently arrange themselves in this place; such as:—Quando jus domini regis et subditi insimul concurrunt jus regis præferri debet.[a] The Crown cannot be prejudiced by the laches of any of its officers.[b] Writs of execution are *judicial;* and are so called because they are grounded on the judgment.[c] The writ of execution must accord, in its mandatory part, with the judgment.[d] A Sheriff is the immediate officer to all the Courts at Westminster to execute writs; and, whether a writ comes to him with or without authority, or be awarded against whom it does not lie, he cannot doubt or dispute its validity, *quia parere necesse est.*[e] No man can be sued for the exercise of his legal right to issue execution on a judgment, until, in doing so, he acts maliciously, and without reasonable and probable cause.[f] The Sheriff is bound to notice all liberties.[g] He is bound to know the person of every inhabitant within his bailiwick.[h] The Sheriff and Undersheriff shall receive all manner of writs, in any place, and at all times, within the county, when and wheresoever they shall be delivered to them.[i] The legal day is, as between subject and subject, divisible into fractions;[k] but as against the Crown, not so.[l] To perfect the execution, no writ (except an *elegit*) need be returned or filed.[m] He is bound to execute every writ in a reasonable time.[a] Writs on civil process cannot be executed on a Sunday.[b] He is bound to raise (if need be) the *posse comitatus.*[c] Domus sua cuique est tutissimum refugium; and the like.[d]

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[a] *Quick's ca.* 9 Co. 129 b; *Giles* v. *Grover*, 2 M. & Sc. 197; 1 Wms. Saund. 219 *g, h*, n. (*t*); 2 ib. 709, n. (*y*). Broom's Maxims, 49; *Reg.* v. *Renton*, 2 Exch. 220; *Reg.* v. *Edwards*, 9 Ex. 32.

[b] *Reg.* v. *Renton*, 2 Exch. 220.

[c] Co. Litt. 289 b. This maxim still prevails, though *ground writs* are abolished by "*The Comm. Law Proc. Act*, 1852."

[d] *Pennoir* v. *Brace*, 1 Salk. 319; *Gee* v. *Fane*, 1 Lev. 225; *Arnell* v. *Weatherby*, 1 C. M. & R. 831; *Bicknell* v. *Wetherell*, 1 Q. B. 916; *Webber* v. *Hutchins*, 8 M. & W. 319; *Brooks* v. *Hodson*, 8 Sc. N. C. 226; *Raynes* v. *Jones*, 9 M. & W. 104; *Cobbold* v. *Chilver*, 1 Dowl. N. C. 726; *Sherwood* v. *Clark*, 15 M. & W. 764: as to amendment, see 1 Q. B. 916; *King* v. *Birch*, 3 Q. B. 425; *Brooks* v. *Hodson*, *suprà*.

[e] *Marshalsea case*, 10 Co. 68; *Thomas* v. *Hudson*, 14 M. & W. 365; 16 ib. 885; Dalt. ch. 20. Unless a different obligation be cast upon him by statute law. See *Cheston* v. *Gibbs*, 12 M. & W. 120; *Groves* v. *Cowham*, 10 Bing. 5. That is, *erroneous* process is a justification, 2 Wms. Saund. 101 *h, h*. He cannot defend himself under a *void* writ, *Hooper* v. *Lane*, 10 Q. B. 560.

[f] *De Medina* v. *Grove*, 10 Q. B. 152; *Roret* v. *Lewis*, 5 D. & L. 372.

[g] *Ante*, p. 27.

[h] *Hereford* v. *M'Namara*, 5 D. & R. 97. *Semble*, also his goods and chattels, Dalt. ch. 78; Ib. App. ch. 8; but not his land; Ib. ch. 68.

[i] Ib. ch. 20; *Brackenbury* v. *Laurie*, 3 Dowl. 180.

[k] *Thomas* v. *Desanges*, 2 B. & A. 586; *Godson* v. *Sanctuary*, 4 B. & Ad. 255; *Chick* v. *Smith*, 8 Dowl. 837; *Pewtress* v. *Annan*, 9 ib. 886.

[l] *Reg.* v. *Edwards*, 9 Exch. 54.

[m] See Dalt. ch. 38.

The following seems a convenient analysis of writs of execution:—

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|---|---|---|
| 1. In personal actions. | 1. Fi. fa... Goods, &c. | |
| | 2. Levari.. Goods and profits of the lands. | |
| | 3. Elegit.. Goods and profits of the lands. | |
| | 4. Ca. sa. . Body. | |
| | 5. Capias utlagatum .. Body, or body, lands and goods. | |
| | 6. Retorno habendo .. The cattle, &c.[e] | |
| 2. In mixed actions[f] | 7. Hab. fa. poss... Land. | |
| | Hab. fa. poss. with Ca. sa. or fi.fa. | Land and body, or Land and goods. |
| 3. On recognizances.[g] | 8. Sci. fa., fi. fa., or elegit ... Goods, or lands and goods. | |
| On stat. merchant. | 9. Ca. sa. extendi facias. | Body, lands and goods. |
| On stat. staple. | 10. | |
| 4. On decrees, rules,&c. | 11. Fi. Fa. | *as above.* |
| | 12. Elegit. | |
| | 13. Ca. sa. | |

### FIERI FACIAS.

What can be seized.

The effect of a judgment, and of the delivery of this writ to the Sheriff, upon the goods and chattels of a debtor, has been already explained.[h] What the Sheriff is not only authorised but commanded by it to seize is next to be considered. The forms of writs are given by Reg. Gen. H. T. 1853, Sch. (A), and, as the older ones do, use the words goods and chattels. He must then levy on all the goods and chattels of the person named in the writ (except he be a foreign minister, or the domestic servant of

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[a] See *Brown* v. *Jarvis*, 1 M. & W. 704; *Randell* v. *Wheble*, 10 Ad. & E. 719; *Mason* v. *Paynter*, 1 Q. B. 980; *Clifton* v. *Hooper*, 6 Q. B. 468.

[b] 29 Car. 2, c. 7, s. 6: and see *Samuel* v. *Buller*, 1 Exch. 440.

[c] See *Posse Com., ante*, p. 103; 2 Wms. Saund. 345; *White* v. *Chapple*, 4 C. B. 630; *Howden* v. *Standish*, 6 ib. 509.

[d] *Semayne's case*, 5 Rep. 91; 1 Smith's, L. C. 39.

[e] For damages or costs or arrears of rent, under 17 Car. 2, c. 7, a fi. fa. or ca. sa. is the process.

[f] All real and mixed actions, except right of *dower*, *dower unde nil habet*, *quare impedit* and *ejectment*, are abolished, 3 & 4 Will. 4, c. 27, s. 36.

[g] A ca. sa., it seems, does not lie; Dalt. ch. 27.

[h] *Ante*, p. 160.

**What are goods and chattels.**

one, and except *bona et catalla ecclesiastica*),[a] in which he has any *legal saleable*[b] interest, general or special, in his own right, or *jure uxoris*, in possession, or in reversion, or as sole owner, joint tenant, or tenant in common; or in which he had any such interest at the time of the delivery of the writ to the Sheriff, since disposed of otherwise than in *market overt*.[c] They must be the property of the person named in the writ.[d] Thus, if he have become bankrupt or insolvent, inasmuch as they belong to his assignees and not to him, they cannot be taken.[e] "Goods, *biens, bona*," (says Lord Coke,) "includes all chattels as well real as personal. Chattel is a French word, and signifies goods, which by a word of art we call *catalla*. Now goods or chattels are either personal or real. Personal, as horses and other beasts, household stuff, bowes, weapons, and such like; called personal, because for the most part they belong to the person of a man, or else for that they are to be recovered by personal actions. Real, because they concern the realty; as terms for years of lands or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by elegit, and such like. *Bona dividuntur in mobilia et immobilia. Mobilia rursum dividuntur in ea quæ se movent et quæ ab aliis moventur.*" But by the common law no estate of inheritance or freehold is comprehended under these words *bona et catalla*.[f] Again, of chattels, some go to the executor, and some to the heir. As regards execution, this would seem to be a mere nominal division: the distinction would seem to be, not between such as go to the executor, and such as go to the heir, but between such as are capable of sale, and such as are not so. The books point out, amongst other things, the following: moveable goods, as horses, oxen, household stuff, plate, ready money,[g] books, wearing apparel (except what is in actual use),[h] husbandry utensils not annexed to the freehold, trade fixtures, such as coppers, vats, and the like, fixed by a tenant for the purposes of his trade, and removeable;[i] corn in the barn; *fructus industriales*, or fruits of industry, as corn growing, artificial grass, and the like,[k] a term of years,[l] the interest of a tenant from year to year,[a] a term *jure uxoris* for the husband's debt,[b] a rent-charge issuing out of a chattel interest, an annuity certain granted by the Crown to a subject,[c] the special property of a pawnee, pledgee, or lessee.[d] And by 1 & 2 Vict. c. 110, any money, bank notes (whether of the Bank of England or of any other bank), checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the defendant. The effect of this statute was to put notes and money, which were not seizable before, on the same footing as goods, and to subject them to all the incidents and liabilities of money which forms the proceeds of goods seized.[e]

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[a] *Post*, p. 174.

[b] *Legg* v. *Evans*, 6 M. & W. 41; *Rogers* v. *Kennay*, 9 Q. B. 592.

[c] *Ante*, p. 161.

[d] *Smith* v. *Plomer*, 15 East, 607; *Manders* v. *Williams*, 4 Exch. 339; *post*, p. 175.

[e] *Post*, p. 176.

[f] Co. Litt. 118 b.; Bro. Abr. tit. Chattels; Com. Dig. Biens, Assets; Vin. Ab. Executors, W, Y, Z; 1 Wms. Executors, 546, &c.

[g] *The King* v. *Webb*, 2 Show. R. 166.

[h] 3 Co. 12; Comb. 356; *Sunbolf* v. *Alford*, 3 M. & W. 254.

[i] *Poole's case*, 1 Salk. 368; *Elwes* v. *Mawe*, 2 Smith's L. C. 114, n.; Amos on Fixtures, 321 (2nd edit.): and see *Hellawell* v. *Eastwood*, 6 Exch. 295.

[k] 56 Geo. 3, c. 50; *post*, p. 183: and see *Wharton* v. *Naylor*, 12 Q. B. 679; Gilb. Exon. 19.

[l] *Palmer's ca.* 4 Co. 74; Dyer, 363; *Scott* v. *Scholey*, 8 East, 467; *The King* v. *Deane*, 2 Show. 85; *Taylor* v. *Cole*, 3 T. R. 294; *Doe* d. *Stevens* v. *Donston*, 3 B. & A. 230; *Playfair* v. *Musgrove*, 1 D. & L. 78.

What cannot be seized.

By the 7 Ann. c. 12, s. 3, all writs against the goods or chattels of any ambassador or other public minister of any foreign prince or state authorised and received by Her Majesty as such, or of the domestic servant of any such person, are utterly null and void, provided, as regards the domestic, he be not a trader within the meaning of the bankrupt acts.[f] No *bona aut catalla ecclesiastica* can be seized under this writ.[g] Goods of a testator or intestate in the hands of an executor or administrator cannot be seized in execution of a judgment against the executor or administrator in his own right.[h] But where an executrix used the goods of her testator as her own, and afterwards married, and then treated them as the goods of her husband, it was decided that she had estopped herself from objecting to their being taken in execution for her husband's debts.[i] Property vested in a trustee, before marriage, for the wife's sole and separate use, cannot be taken for the husband's debt;[k] but money, paid to her by the trustee, or property purchased by her with the money so paid, belongs to her husband, and may be taken for his debt.[l] The goods of a woman, cohabiting with the defendant, assuming his name, and passing for his wife, cannot be taken for his debt; if she have done no more to *estop* herself from showing they were her own.[m] The Sheriff cannot seize landlord's fixtures even though the freehold is in the debtor;[n]

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[a] *Doe* d. *Westmoreland* v. *Smith*, 1 M. & Ry. 137.

[b] See *Farr* v. *Newman*, 4 T. R. 639.

[c] *York* v. *Twine*, Cro. Jac. 78; Jenkyn, 312, case 97.

[d] *Dean* v. *Whittaker*, 1 C. & P. 348; 3 ibid. 438; *Gordon* v. *Harper*, 7 T. R. 11; *Manders* v. *Williams*, 4 Ex. 339.

[e] See *Mutton* v. *Young*, 4 C. B. 375; *Collingridge* v. *Paxton*, 11 C. B. 683; *Wood* v. *Wood*, 4 C. B. 397.

Sect. 5. See *Fisher* v. *Begrez*, Dowl. 588.

[g] Dalt. 219; 2 Inst. 472; Bac. Abr. Execution: and see 2 Mod. R. 256. They are got by a *fi. fa. de bonis ecclesiasticis* directed to the *bishop*.

[h] *Farr* v. *Newman*, 4 T. R. 621; *Fenwick* v. *Laycock*, 2 Q. B. 108.

[i] *Quick* v. *Staines*, 1 B. & P. 293; *Fenwick* v. *Laycock*, 2 Q. B. 108.

[k] *Cadogan* v. *Kennet*, Cowp. R. 432; *Jarman* v. *Woolloton*, 3 T. R. 618; *Izod* v. *Lamb*, 1 C. & J. 35; *Simmons* v. *Edwards*, 16 M. & W. 838.

[l] *Carne* v. *Brice*, 7 M. & W. 183; *Tugman* v. *Hopkins*, 5 Sc. N. R. 482; *Messenger* v. *Clarke*, 5 Exch. 388.

[m] *Edwards* v. *Bridges*, 2 Stark. 396; *Glasspoole* v. *Young*, 9 B. & C. 696; *Keene* v. *Dilke*, 4 Exch. 388.

[n] *Winn* v. *Ingilby*, 5 B. & A. 625. See also *Farrant* v. *Thompson*, 5 B. & A. 826; *ante*, p. 174.

nor what is part of the freehold, as doors, windows, &c.;[a] nor apples upon trees, for they belong to the freehold;[b] nor an estate in fee, or for life;[c] nor a mere equitable interest;[d] nor an equity of redemption;[e] nor things *in custodia legis;*[f] nor a mere personal interest, as a right of lien;[g] nor any tenement which cannot be granted over, as the office of filacer, or the like;[h] nor money in the hands of another, as trustee for the debtor;[i] nor money due and owing to the debtor, as a debt from another person, and in the hands of the latter;[k] nor money seized under a *fi. fa.* and in the Sheriff's hands;[l] nor the goods of a person not named in the writ.[m] From this last proposition it follows, as a corollary, that if A. transfer his property to B., but still remain in possession of it, such possession not being *fraudulent*, it cannot be taken in an execution against A.[n] But if the transfer be *fraudulent* (which is, in all cases, a question for the jury, and not for the Court, to determine), it is void as against *creditors;* and they remain, as regards creditors, A.'s property, and liable to be seized accordingly.[o] Note, a sale of property, for good consideration, is not, either at common law or under stat. 13, Eliz. c. 5, fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judgment creditor.[p] Note, also, that an assignment of goods, in fraud of creditors, is valid *inter se*, and as between either party to it and a stranger; and a Sheriff, claiming to seize the goods, for a judgment creditor, is a stranger within the meaning of the rule, until his authority to act for a creditor be shown.[q]

Bankruptcy.

From the rule which forbids the officer to take the property of any one but of the person named in the writ, it follows that property vested in consequence of bankruptcy or insolvency in the assignees of a debt or cannot be seized by virtue of a writ against him. By the "Bankrupt Law Consolidation Act, 1849," (12 & 13 Vict. c. 106, s. 133,) all transfers of goods and chattels *bonâ fide* made, and all executions against goods and chattels *bonâ fide* executed and levied by *seizure and sale*, before the date of the fiat or the filing of the petition, are valid, provided the buyer or execution creditor had not, at the time of the transfer, or at the time of the sale under the execution, notice of an act of bankruptcy:[a] Provided, also, that the transfer was not by way of fraudulent preference, or, if the execution be founded on a judgment or a warrant of attorney, cognovit or judge's order obtained by consent, provided the warrant of attorney, &c., were not by way of fraudulent preference.[b] One need hardly add, that if either notice or fraudulent preference do taint the transaction, the transfer or execution is void. Purchases *bonâ fide*, and for valuable consideration, however, are not to be impeached on account of such notice, unless a petition shall be filed or fiat sued out within 12 months after such act of bankruptcy.[c] A warrant of attorney to confess judgment in a personal action, given within two months of the filing of the petition, and being wholly or in part for an antecedent debt, or money demand; and any cognovit or consent to a judge's order, given within two months in any action commenced by collusion with the bankrupt, and not adversely, or purporting to be given pending an action, when, in fact, it was not so, such bankrupt being unable to meet his engagements at the time, are null and void, whether given in contemplation of bankruptcy or not.[d] Besides, they, or true copies thereof, must be filed within 21 days, otherwise they are null and void.[e] The notice of an act of bankruptcy to have this effect must be given to the *execution creditor*, or to one of them if more than one,[f] or to his attorney, or *semble* to a clerk who has so far the management of the business as to have the power of acting on such communication, in the attorney's absence.[g] Notice to the Sheriff, or to the bailiff, is insufficient.[f] If a notice be given by a trader that he has filed a declaration of insolvency, and a fiat issues thereon within two months, the execution creditor will be deprived of the benefit of his execution.[h] Notice that the party has committed an act of bankruptcy is sufficient without specifying it.[i] A fraction of a

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[a] Com. Dig. Tit. Exec. C. 4.

[b] Gilb. Ex. 19.

[c] 3 Co. 13; *sed qu.* as to an estate *per autre vie*, 29 Car. 2, c. 3; Comb. 201; and an outstanding term, to attend the inheritance, *Doe* d. *Phillips* v. *Evans*, 1 C. & M. 450.

[d] *Scott* v. *Scholey*, 8 East, 467; *Metcalf* v. *Scholey*, 2 N. R. 861.

[e] Ibid.; *Lyster* v. *Dolland*, 1 Ves. jun. 431; *Burdon* v. *Kennedy*, 1 Atk. 739.

[f] Com. Dig. Exec. c. 3; *Letchmere* v. *Thorowgood*, 3 Mod. 236; *Lovick* v. *Crowder*, 8 B. & C. 132; *Wharton* v. *Naylor*, 12 Q. B. 673; *Belcher* v. *Patten*, 6 C. B. 608.

[g] *Legg* v. *Evans*, 6 M. & W. 36; *Rogers* v. *Kennay*, 9 Q. B. 592.

[h] Dyer, 7 b.

[i] *France* v. *Campbell*, 9 Dowl. P. C. 916.

[k] *Harrison* v. *Paynter*, 6 M. & W. 387; *Wood* v. *Wood*, 4 Q. B. 400: nor will the Court order the Sheriff to retain a sum in his hands to satisfy the debt, *Willows* v. *Ball*, 2 N. R. 376; *Knight* v. *Criddle*, 9 East, 48; *Padfield* v. *Brine*, 3 B. & B. 294.

[l] Ib.; *Masters* v. *Stanley*, 8 Dowl. 169.

[m] *Glasspoole* v. *Young*, 9 B. & C. 696; *Jarmain* v. *Hooper*, 1 D. & L. 769; *ante*, p. 173.

[n] *Twyne's ca.* 3 Co. 80; 1 Smith's L. C. 1; *Latimer* v. *Batson*, 4 B. & C. 652; *Martindale* v. *Booth*, 3 B. & Ad. 498.

[o] Ibid.: and see *Remmett* v. *Laurence*, 15 Q. B. 1004; *Shattock* v. *Cardon*, 7 Exch. 725.

[p] *Wood* v. *Dixie*, 7 Q. B. 892.

[q] *Bessey* v. *Windham*, 6 Q. B. 167; *White* v. *Morris*, 11 C. B. 1915.

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[a] See *Hernaman* v. *Coryton*, 5 Exch. 453; *Hutton* v. *Cooper*, 6 ib. 159; *Cannan* v. *So. E. R. Co.* 7 ib. 843; *Christie* v. *Winnington*, 8 ib. 287.

[b] See *Andrews* v. *Diggs*, 4 Exch. 827; *Bell* v. *Bidgood*, 8 C. B. 763.

[c] Sect. 134.

[d] Sect. 135.

[e] Sect. 136, 137; *Acraman* v. *Herniman*, 16 Q. B. 1003.

[f] *Ramsay* v. *Eaton*, 10 M. & W. 27.

[g] *Pike* v. *Stephens*, 12 Q. B. 465; *Pennell* v. *Stephens*, 7 C. B. 998.

[h] *Follett* v. *Hoppe*, 5 C. B. 244; *Green* v. *Laurie*, 1 Exch. 335. The 5 & 6 Vict. c. 122, s. 22, is repealed in 12 & 13 Vict. c. 106, s. 70 ("The Bankrupt Law Consolidation Act, 1849").

[i] *Udal* v. *Walton*, 14 M. & W. 260.

Insolvency.

day may be inquired into.[a] By the 1 & 2 Vict. c. 110, s. 61, it is enacted, "that in all cases where any prisoner, whose estate shall have been vested in the said provisional assignee under this Act, shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem, or bill of sale, whether for a valuable consideration or otherwise, *no person shall, after the commencement of the imprisonment of such prisoner*,[b] avail himself or herself of any execution issued, or to be issued, upon any judgment, obtained or to be obtained upon such warrant of attorney, or cognovit actionem, or of such bill of sale, *either by seizure and sale* of the property of such prisoner, or any part thereof, *or by sale of such property theretofore seized*, or any part thereof; but that any person or persons, to whom any sum or sums of money shall be due in respect of any such warrant of attorney, or cognovit actionem, or of such bill of sale, shall and may be a creditor or creditors for the same under this Act." In *Squire* v. *Huetson*[c] judgment was obtained against defendant on a warrant of attorney, and a fi. fa. issued. The Sheriff seized in *February*, the defendant went to prison in *March*, and the vesting order was in *April*. The Sheriff received part of the money before the commencement of the imprisonment and part after that time, and the Court decided that the execution creditor was entitled to what had been realised before and the assignee to what was realised after the commencement of the debtor's imprisonment. It must be assumed (although it does not appear) that the warrant of attorney had been duly filed, &c., according to the 3 Geo. 4, c. 39, and 1 & 2 Vict. c. 110, s. 60; otherwise the execution was void, and the assignee entitled to the whole.[d] Under 1 & 2 Vict. c. 110, s. 59, a voluntary assignment of all his effects, within three months before the commencement of the imprisonment of the assignor, is fraudulent and void, though made for the benefit of *all* his creditors.[e] When a person has been adjudged a bankrupt, all his personal estate and effects present and future, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, *before he shall have obtained his certificate*, vest absolutely in his assignees by virtue of their appointment. Notwithstanding, an *uncertificated* bankrupt may acquire property, and none but his assignees can dispute his title to it.[f] In a like condition was one who had been twice a bankrupt, and not paid 15*s.* in the pound under the second fiat.[f] But as "The Bankrupt Law Consolidated Act, 1849," does not

After acquired property.

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[a] *Bird* v. *Bass*, 6 Sc. N. R. 928; *Pewtress* v. *Annan*, 9 Dowl. 828; *Hernaman* v. *Coryton*, 5 Ex. 453.

[b] In *Hunt* v. *Robins*, 2 G. & D. 653, the purchaser had *taken possession* before the commencement of the imprisonment, and it was held that a sale after was good, and not a case contemplated by the Act: and see *Hardy* v. *Tingey*, 5 Ex. 294.

[c] 1 Q. B. 309.

[d] *Biffin* v. *Yorke*, 6 Sc. N. C. 231; *Acraman* v. *Herniman*, 16 Q. B. 998.

[e] *Jackson* v. *Thompson*, 2 G. & D. 598; *Thompson* v. *Jackson*, 4 Sc. N. R. 234: but the Act applies only to such things as can be taken in execution; *Sims* v. *Thomas*, 12 Ad. & E. 536.

[f] *Herbert* v. *Sayer*, 5 Q. B. 975.

contain the 127 sect. of the 6 Geo. 4, c. 16, or any like clause, it would seem that one who has been twice a bankrupt, and not paid 15*s.* in the pound (having a certificate of conformity), is as capable of taking and holding property as if he had never been bankrupt at all. If, therefore, a writ be delivered to the Sheriff, inasmuch as an uncertificated bankrupt may acquire property, he should, except it be for a debt provable under the bankruptcy,[a] proceed until some act of interference on the part of the assignees; after that, the property, in specie or in proceeds, becomes theirs, and the Sheriff must act accordingly. This act of interference is not, as under some of the *insolvent* statutes, an act of court (5 & 6 Vict. c. 116, s. 9, and 7 & 8 Vict. c. 96, s. 23),[b] but may be any act indicative of an intent to claim the property.

An insolvent, in like manner, may, unless his assignees interfere, acquire and hold property after the vesting order, and before his final discharge.[c]

Death of parties. If plaintiff die, after writ issued, it may still be executed; but if defendant die after *semble*, not.[d]

Executors. In the learned notes to *Wheatley* v. *Lane*[e] may be found the following passage:—"A judgment against an executor or administrator, whether by default or upon demurrer, or upon a verdict on any plea pleaded by the executor, except *plene administravit*, or admitting assets to such a sum, *et reins ultra*, &c., is conclusive upon him, that he has assets to satisfy such judgment. Indeed, if the executor or administrator plead either a general or special *plene administravit*, it is now held that he is only liable to the amount of the assets proved to be in his hands; though the case was formerly taken to be, that if *any* assets, however small, were proved to be unadministered, the plaintiff was entitled to recover *his whole demand* from the executor. So that now a judgment against an executor on a verdict upon *plene administravit*, is only an admission of assets to the extent of the assets proved to be in his hands. If, therefore, upon a *fieri facias de bonis testatoris* on a judgment obtained against an executor by either of the ways above mentioned, either no goods can be found which were the testator's, or not sufficient to satisfy the demand; or, which is the same thing, if the executor will not expose them to the execution, *that* is evidence of a *devastavit;* and therefore it is very reasonable that the executor should become *personally* liable and chargeable *de bonis propriis*. And the *mode* of proceeding is immaterial, because the executor is entitled to the same defence in debt upon the judgment suggesting a *devastavit*, as in the proceeding by a *scire fieri* inquiry. The *judgment* against the *executor* being thus the foundation of the action, it follows, that no action of debt suggesting a *devastavit* by the executor lies against him upon a judgment obtained against his *testator*, because that is no confession of assets by the executor, and therefore in such cases it is necessary to sue out a writ of *scire facias* against the executor, to make him a party to the judgment; to which writ the executor may plead a want of assets, or other plea, which shows that the plaintiff ought not to have execution against him upon the judgments. And still less will such action lie against an executor upon a *bond* of his testator, suggesting a *devastavit* in the executor. But if a man obtains judgment against an executor, and dies, his executor may, without first suing out a *scire facias*, bring an action of debt, upon the judgment against the executor, suggesting a *devastavit;* for the action is brought against the same person against whom the judgment was had, and by that judgment assets were admitted. This action may be brought upon the judgment, *upon* a bare suggestion of a *devastavit*, without any writ of *fieri facias* first taken out upon the judgment, as was done in the case of *Wheatley* v. *Lane.* But the usual course is, first to sue out a *fieri facias* upon the judgment, and, upon the Sheriff's return of *nulla bona,* to bring the action and state the judgment, the writ and return in the declaration, and on the trial, the record of the judgment, the *fieri facias*, and the return, will be sufficient evidence to prove the case. If the Sheriff cannot find any assets, he may, if he pleases, return a *devastavit*, as well as *nulla bona*, to the writ of *fieri facias de bonis testatoris;* for the *fieri* inquiry is only for his security. And he seems to run no great risk by so doing; for the judgment, and no assets to be found will be sufficient evidence of a *devastavit* in an action against him for a false return."

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[a] See *Davis* v. *Shapley*, 1 B. & Ad. 54; *Barrow* v. *Poile*, ib. 629; *post*, 179.

[b] See *Platell* v. *Bevill*, 6 D. & L. 2.

[c] *Jackson* v. *Burnham*, 8 Exch. 173.

[d] *Thoroughgood's ca.* Noy, 73, cited in *Ellis* v. *Griffith*, 16 M. & W. 109.

[e] 1 Wms. Saund. 219 *f*.

Death while in execution.

If a person be charged in execution, and die, his goods and chattels may be taken on a fi. fa. just as if he had never been charged in execution.[a] This is by the 21 Jac. 1, c. 24, which contains a saving clause as to his lands *bonâ fide* sold after judgment, for the benefit of his creditors, but not as to his goods and chattels.

Direction not to execute.

If the Sheriff be directed by the plaintiff or his attorney[b] not to execute the writ, or suspend its execution, he is bound to obey, for so far he is the plaintiff's agent:[c] directions to his bailiff do not necessarily amount to directions to him.[c]

The bare entry of an award of a fi. fa. is no satisfaction.[d]

Several writs, priority, &c.

It often happens that two or more writs have been delivered to the Sheriff, and are in his possession at the time he makes the seizure. When this happens, the maxim *qui prior est tempore potior est jure* must be his guide; in other words, he is to execute them according to their priority, which, as to writs of *fi. fa.*, is according to the time of their delivery to him. By executing is here meant, that he is to apply the proceeds so. It is not material whether he seize the goods under the first or under the last writ; for when seized, they are, in contemplation of law, in his custody, under all the writs he then has; and when he sells, he sells under all. Thus, then, he must, in general, apply the proceeds according to this priority. If the proceeds be more than sufficient to satisfy the first, he must apply the surplus to the second, then to the third, and so on.[a] On the other hand, if the first be avoided by the bankrupt laws,[b] or be void on the ground of fraud,[c] or the like, the proceeds must be applied to the second, and so forth; so if the whole proceeds are exhausted, by a landlord's claim for rent, *and* a prior writ together, a return of *nulla bona* is the proper return to make to a second writ.[d] Again, a second or subsequent writ must have priority, if the execution of a former be suspended at the time the other comes.[e] In cases of this kind, *one* actual entry or seizure is sufficient to satisfy the exigencies of all delivered to him; but, there must be an *actual* entry or seizure of the property under one, before there can arise a constructive one under another of the same property. Thus, a fi. fa. was issued against A., one of two partners, and under it partnership property was seized; afterwards, another was issued against A. and B., and delivered to the same Sheriff, but no actual entry or seizure took place under it, before a *fiat* in bankruptcy issued against them; inasmuch as under the first, A.'s interest alone was affected, the execution, on the joint judgment, was not served and levied by seizure before the *fiat*, and the assignees prevailed over the execution creditor.[f]

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[a] See *post*, p. 203; *ante*, p. 178.

[b] *Levi* v. *Abbott*, 4 Exch. 588.

[c] See *Barker* v. *St. Quintin*, 1 D. & L. 542; *Howard* v. *Cauty*, 2 ib. 115; *Walker* v. *Hunter*, 2 C. B. 324. See form of return, *post*, 188.

[d] *Holmes* v. *Newlands*, 1 Dav. & M. 643, 647.

Seizure under one sufficient.

Fraudulent judgments.

With regard to *fraudulent executions*. If no creditor's rights intervene, the Sheriff must sell under a writ founded on a fraudulent judgment, for it is void as against creditors; and by implication, it is void, also, as against the Sheriff, when acting in right of a creditor.[g] The Sheriff is responsible for neglecting to seize and sell, if he have notice of the fraud, or if he could discover it by reasonable inquiry.[h]

After error brought.

Executing a *fi. fa.* after service of the copy of the note and grounds of error, unless execution be ordered by the Court or a

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[a] *Drewe* v. *Lainson*, 11 A. & E. 529; *Aldred* v. *Constable*, 6 Q. B. 370.

[b] *Aldred* v. *Constable* 6 Q. B. 370; *Graham* v. *Witherby*, 7 ib. 491.

[c] *Imray* v. *Magnay*, 11 M. & W. 267; *Christopherson* v. *Burton*, 3 Ex. 160; *Shattock* v. *Carden*, 6 ib. 725; *Remmett* v. *Lawrence*, 15 Q. B. 1004.

[d] *Wintle* v. *Freeman*, 11 A. & E. 539; *Heenan* v. *Evans*, 4 Sc. N. R. 2.

[e] *Hunt* v. *Hooper*, 1 D. & L. 628; *Howard* v. *Canty*, 2 ib. 115.

[f] *Johnson* v. *Evans*, 1 D. & L. 935: and see *Remmett* v. *Lawrence*, 15 Q. B. 1004.

[g] *Imray* v. *Magnay*, *suprà*; *ante*, 175.

[h] *Imray* v. *Magnay*, 11 M. &. W. 275; *Christopherson* v. *Burton*, 3 Exch. 162.

Judge, makes the Sheriff a trespasser.[a] Where a writ of error was allowed between the seizure and sale, it was adjudged that he must sell; which he did, and brought the money into Court to abide the event.[b]

**Time of executing writ.**

He must enforce the writs within a convenient time after delivery. He must sell, within a convenient time, without a *venditioni exponas.*

Again, if he continue in possession of the goods, for more than a reasonable time, he is a trespasser.[c] The writ, if unexecuted, does not remain in force for more than one year from its teste, unless properly renewed. It may be executed on any day, except *Sunday;* even on the return day, if it be made returnable on a day certain.

**Quantity of goods to be seized.**

His duty is to seize such a quantity of goods only as are reasonably sufficient to satisfy the amount endorsed on the writ.[d]

**Selling at an undervalue.**

If, from his negligence, the goods sell at an undervalue, he will be liable in damages to both debtor and creditor for the injury to their respective interests.[e]

**Warranty of title.**

There is no implied warranty of title to goods sold at a Sheriff's sale.[f]

**Breaking doors.**

*Every man's house is his castle.*[g] An officer cannot break open any *outer* door or window, to execute process in a civil suit. But if he find the *outer* door open, and enter that way; or, if the outer door be opened to him from within, and he enter, he may break open *inner* doors, if necessary.[g] The privilege, be it observed, extends only to the actual occupier and to his family, and his goods, &c.—to those which are lawfully and without fraud or crime there. Again, it is a *dwelling-house* alone that is privileged; the outer door, &c., of a barn or outhouse, not connected with the dwelling, may be broken open.[h] Chambers in the Inns of Court and Colleges are dwelling-houses within the meaning of the rule.[i] The Sheriff's justification for entering the *defendant's* dwelling-house does not depend upon the result of finding or of not finding his goods;[k] but it is otherwise of a stranger's house, for he cannot justify the breaking open the outer or inner door of a *stranger's* house, unless it turn out that the defendant's goods are actually there;[k] neither can he justify *entering* a stranger's house, if none of the defendant's goods be there, although the door be open, and although the Sheriff may have reasonable cause to suspect that they are there.[a] Under a fi. fa. against the goods of an intestate, in the hands of an administratrix, he may justify entering the house of her husband, though no goods be found there.[b] A bailiff may break open the door of a lodger, having first gained peaceable entrance at the outer door of the house.[c] If the officer be in, and cannot remove the goods without opening the outer door, and neither the defendant nor any one on his behalf be present, whom the officer could ask to open it, he may break it open.[d] A distinction, in this respect, has long prevailed between process at the suit of the Crown and that of a subject. In all cases, where the Crown is party, the Sheriff (if the doors be not open) may break the party's house to do execution, if he cannot enter without; but, before he breaks in, he ought to signify the cause of his coming, and to make request to open the door.[e] The breaking open doors, &c., under circumstances not justifiable, does not, it would seem, vitiate the execution.[f] It is said in Com. Dig. (Exec.), that the officer may not open a latch. But this seems not to be so. He may, it seems, open the door as others do, who are in the habit of going in.[g]

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[a] See 2 Wms. Saund. 101, *i*; *Belshaw* v. *Marshall*, 4 B. & Ad. 336; 15 & 16 Vict. c. 76, s. 150.

[b] See 2 Wms. Saund. 101, *l*.

[c] *Playfair* v. *Musgrove*, 14 M. & W. 239; *Ash* v. *Dawnay*, 8 Exch. 239.

[d] *Aldred* v. *Constable*, 6 Q. B. 381; *Gawler* v. *Chaplin*, 2 Exch. 507.

[e] *Phillips* v. *Bacon*, 9 East, 298; *Mullet* v. *Challis*, 16 Q. B. 240.

[f] *Chapman* v. *Speller*, 14 Q. B. 622.

[g] *Semayne's ca.* 1 Smith's L. C. 39; *Kerby* v. *Denby*, 1 M. & W. 342; *D. of Brunswick* v. *Sloman*, 8 C. B. 317; *Hutchison* v. *Birch*, 4 Taunt. 627.

[h] *Penton* v. *Browne*, 1 Sid. 181; *dist.* *Brown* v. *Glenn*, 16 Q. B. 256: and see *Ryan* v. *Shilcock*, 7 Exch. 74.

[i] See *Lee* v. *Gansel*, Cowp. 1.

[k] See *Morrish* v. *Murrey*, 13 M. & W. 57; *Ratcliffe* v. *Burton*, 3 B. & P. 223; *Hutchison* v. *Birch*, 4 Taunt. 627; *Cooke* v. *Birt*, 5 ib. 765; *Johnson* v. *Leigh*, 6 ib. 245.

How executed.

Sale.

The officer enters and seizes part, in the name of the whole; he makes an inventory; leaves a man in possession; and then, within a reasonable time, either removes them off the premises, to a place of safety, until he can sell them, or he sells them on the premises, with the consent of the debtor, or of the person on whose premises the goods are. If the Sheriff delay the sale for an *unreasonable* time, and by that delay let in a distress, or a petition for adjudication of bankruptcy, he will be liable in damages to the party injured.[h] He may sell them by private contract or public auction.[i] He may sell though out of office.[k] The goods must be *sold*, if the debt, &c., be not satisfied; in other words, they cannot be delivered to the party, in satisfaction of his debt;[l] nor can the Sheriff retain them, and pay the debt out of his own proper money.[m] There is no objection to a sale to the plaintiff, at their real value.[n] If an inadequate price be offered, he should not sell, but return that they remain in his hands for

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[a] *Morrish* v. *Murrey*, 13 M. & W. 58, and cases in the last note.

[b] *Cooke* v. *Birt*, 5 Taunt. 765.

[c] *Lee* v. *Gansel*, Cowp. 1.

[d] *Pugh* v. *Griffith*, 7 A. & E. 827.

[e] *Semayne's ca.* 3rd Res.; *Burdett* v. *Abbot*, 14 East, 157; Hawk. P. C. b. 2, ch. 14, s. 1.

[f] *Semayne's ca. suprà*; 2 Bac. Ab. Exec. (N); *Duke of Brunswick* v. *Sloman*, 8 C. B. 317; *Ryan* v. *Shilcock*, 7 Ex. 74; *Percival* v. *Stamp*, 9 ib. 167.

[g] See *Ryan* v. *Shilcock*, 7 Exch. 77.

[h] *Airdon* v. *Davis*, 9 Bing. 740; *Jacobs* v. *Humphrey*, 2 Cr. & M. 418; *Carlile* v. *Parkins*, 3 Stark. 164; *Rowe* v. *Ames*, 8 Dowl. 754; *Lewis* v. *Alcock*, 3 M. & W. 188. See *Mutton* v. *Young*, 4 C. B. 373, as to sale of bills and notes.

[i] *Woodgate* v. *Knatchbull*, 2 T. R. 157. Form of bill of sale, *post*, 188.

[k] *Ayre* v. *Aden*, Cro. Jac. 73; *Clerk* v. *Withers*, 6 Mod. 298; *Doe* v. *Donston*, 1 B. & A. 230.

[l] *Bealy* v. *Sampson*, 2 Vent. 95; Dalt. 526; Bac. Abr. Execution (C); *Thomson* v. *Clerk*, Cro. Eliz. 504; Noy, 56, S. C.

[m] *Waller* v. *Weedale*, Noy, 107.

[n] *Stratford* v. *Twynam*, Jac. 418; Chit. Archb. 572.

Abandoning possession.

want of buyers.[a] Possession must not be abandoned; thus, where the officer quitted the premises after the seizure, leaving no one in charge of the goods, but taking with him the key of a drawer, wherein he had locked his warrant, it was held an abandonment.[b] As to partnership property; the Sheriff seizes the whole, or a part, in the name of the whole, and sells the debtor's undivided interest therein; the vendee is tenant in common with the other partner.[c] Note well, the property of the other moiety is not affected by the judgment, nor by the execution. The actual or formal seizure of the whole arises from the necessity of the case.[c]

Partnership property.

Joint stock and other public bodies.

The statutes incorporating joint stock or other public bodies, in general, point out the mode of obtaining the fruits of a judgment obtained against their secretary or other nominal party to the record: when that is so, the statute must be strictly followed. Under some the proceeding is by *scire facias;* under some, by distress; others make the reserved fund liable; some, again, make no provision at all, but rest by saying that the nominal party sued shall not be *personally* liable. In the latter cases the fruits of the judgment are obtained by *mandamus* or *proceedings in equity*.[d]

Growing crops, &c.

The 56 Geo. 3, c. 50, enacted that no Sheriff should carry off, or sell, or dispose of, for the purpose of being carried off, from any farm, any straw, manure, &c., where by the lease or agreement such things were not to be carried off; that the tenant must give notice of the existence of such stipulation to the Sheriff, and the latter to the landlord, of the fact of possession being taken. It then enabled the Sheriff to dispose of the produce subject to an agreement to expend it on the land; and enacted that no clover, rye grass, or any artificial grass, newly sown, and growing under any crop of standing corn, should be sold or disposed of at all. But, probably, few questions will hereafter arise on this statute, as the landlord has now, by the 14 & 15 Vict. c. 25, the power to distrain on the growing crops of his tenant, for accruing rent; that is to say, so long as they remain on the land, and in default of sufficient distress of the goods and chattels of the tenant; notwithstanding any bargain, sale, or assignment which may have been made or executed of such growing crops by the Sheriff.[e]

Lease for years.

How is a lessee's interest to be seized? It has been asserted that the Sheriff cannot enter to do this. But surely he must enter to seize and to assign the lease; for that is a very different thing from his entering after seizure and sale to give the vendee possession of the term, which is all that the case referred to, in reality, decides.[a] By the sale, the vendee acquires a right of entry and a right of possession, which he must, if necessary, enforce by ejectment.[b] Again, the Sheriff does not give the purchaser a legal title by merely putting him into possession; he must execute an assignment.[c] Although the execution on a joint judgment must be *joint*, yet it may be levied upon one only, and he may have contribution against the others.[d] If the Sheriff under a fi. fa. sell goods, and the judgment be reversed, the money, and not the thing *in specie*, is to be restored; so if a term be sold, the term shall not be restored, but the money.[e]

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[a] *Keightley* v. *Birch*, 3 Camp. 521; form of return, *post*, 187: and see *post*, 190, n. (a).

[b] *Blades* v. *Arundale*, 1 M. & S. 710.

[c] *Heydon* v. *Heydon*, 1 Salk. 392; *Johnson* v. *Evans*, 7 Sc. N. C. 1044; *Mayhew* v. *Merrick*, 7 C. B. 250.

[d] *Wormwell* v. *Hailstone*, 6 Bing. 668; *Bartlett* v. *Pentland*, 1 B. & Ad. 704; *Corpe* v. *Glyn*, 3 ib. 802; *The King* v. *St. K. Dk. Co.*, 4 ib. 363; *Harrison* v. *Timmins*, 4 M. & W. 518.

[e] See *Wharton* v. *Naylor*, 6 D. & L. 136; 12 Q. B. 673, S. C.; *Hutt* v. *Morrell*, 11 Q. B. 438; *Roden* v. *Eyton*, 6 C. B. 427.

Execution of joint judgment.

Judgment reversed.

Title of purchaser.

Inquest as to property.

A *bonâ fide* purchaser under a writ of *fi. fa.* has a good title against all the world.[f] It seems once to have been thought, that if the Sheriff had any doubt whether the goods were the defendant's, he might summon a jury *de bene esse*, and that their inquisition would, in trespass, be admissible evidence in mitigation of damages; but this is not so now. If the question were whether the Sheriff had acted *maliciously* or not, it might, perhaps, be admissible on such an issue.[g]

Amount to be levied.[h]

*For what amount is he to levy?* Let us suppose the writ indorsed thus: "Levy 100*l.*, besides poundage fees and expenses of execution." The party entitled to execution, whether plaintiff or defendant, may levy these over and above the sum recovered.[i] What do they consist of? as follows:—

| | £ | *s.* | *d.* |
|---|---|---|---|
| Principal indorsed .................................. | 100 | 0 | 0 |
| Interest[k] .................................................. | 2 | 10 | 0 |
| Poundage[l] ................................................ | 5 | 0 | 0 |
| Writ .......................................................... | 0 | 12 | 0[j] |
| Warrant...................................................... | 0 | 2 | 6 |
| To bailiff for executing warrant .................... | 1 | 1 | 0 |
| For man in possession three days (not boarded). | 0 | 15 | 0 |
| Sale by auction, five per cent. on 100*l.*[m] ......... | 5 | 0 | 0 |
| Amount to be levied ........................ | £115 | 0 | 6 |

Expenses.

No matter what *extra* trouble or expense the Sheriff may have incurred (whether caused by the debtor's own wrongful act, to prevent a rescue by removal of the goods for sale, travelling expenses, to save expense, as by appraisement instead of public auction, on account of an adverse claim, or the like) the rule is inflexible :[a] the poundage he receives being deemed sufficient as a set-off against anything of this kind. He is not entitled to poundage without a *bonâ fide* levy :[b] by levy is here meant seizure, not seizure *and* sale ; therefore, any compromise between the parties, between seizure and sale, does not affect the right to poundage.[c] When a sale takes place the measure of poundage is the amount of sale, and not the sum actually paid over to the execution creditor.[d] If an erroneous writ be delivered to the Sheriff, and he execute it, he shall have his fees.[e] Payment to the Sheriff, or to his bailiff, is a good payment ;[f] and the defendant is thereby discharged from the judgment and all further execution, although the officer do not satisfy the execution creditor ;[f] but it is no satisfaction of the debt, except for the person whose goods are taken.[g] If the defendant pay or tender the debt before execution, any execution afterwards would be a trespass.[h] He must raise the *posse comitatus*, if need be.[i] If any surplus remain in the Sheriff's hands he may keep it until the defendant *demand* it of him ; for he is not bound to search for him.[k]

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[a] *Playfair* v. *Musgrove*, 3 D. & L. 76; 14 M. & W. 239: and see *post*, p. 199.

[b] Ibid.

[c] *Doe* d. *Hughes* v. *Jones*, 9 M. & W. 372; *Playfair* v. *Musgrove*, 14 ib. 239.

[d] *Herries* v. *Jamieson*, 5 T. R. 556.

[e] *Manning's ca.* 8 Co. 94 *b.*; *Hoe's ca.* 5 Co. 90 b; 2 Wms. Saund. 69; *Doe* v. *Thorn*, 1 M. & S. 425.

[f] *Imray* v. *Magnay*, 11 M. & W. 275; *Lock* v. *Sellwood*, 12 Q. B. 788.

[g] See *Glossop* v. *Pole*, 3 M. & S. 177.

[h] The fees given by the table under 1 Vict. c. 55, may be levied, although not indorsed on the writ; *Curtis* v. *Mayne*, 2 Dowl. N. C. 37.

[i] 15 & 16 Vict. c. 76, s. 128.

[k] Reg. Gen. Hil. T. 1853, r. 76.

[l] Above £20; under £20, 11*s.*; Reg. Gen. Hil. T. 1853, (Costs.)

[m] This does not apply to appraisement and bill of sale; *Phillips* v. *Canterbury*, 11 M. & W. 619; *Marshall* v. *Hicks*, 10 Q. B. 19. *Duties* of excise on sales by auction no longer exist; 8 & 9 Vict. c. 15. He cannot charge for *search* or *discharge*; *Masters* v. *Lowther*, 11 C. B. 948.

Poundage.

Fees on erroneous writ.

Payment to Sheriff or officer.

Execution after payment.

Posse comitatus.

What to do with surplus.

## RETURNS.[l]

### *Nulla Bona.*

The within-named *C. D.* hath no goods or chattels in my bailiwick whereof I can cause to be made the sum within-mentioned or any part thereof.

The answer of *G. A.* Esq. High Sheriff.

### *Nulla Bona and Clericus.*

The within-named *C. D.* hath no goods or chattels (nor any lay fee) in my bailiwick whereof I can cause to be made the sum within-mentioned, or any part thereof; and I do further certify and return that the said *G. T.* is a beneficed clerk that is to say rector of the rectory [*or* "vicar of the vicarage"] and parish church of *M.* in the county of *W.* and diocese of *C.*[a]

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[a] *Slater* v. *Hames*, 7 M. & W. 413; *Davies* v. *Edmonds*, 1 D. & L. 396; *Phillips* v. *Canterbury*, 11 M. & W. 621; *Bayley* v. *Potts*, 8 Ad. & E. 272.

[b] *Colls* v. *Coates*, 11 Ad. & E. 826; *Brun* v. *Hutchinson*, 2 D. & L. 45.

[c] *Alchin* v. *Wells*, 5 T. R. 470: and see *Graham* v. *Grill*, 2 M. & S. 294; *Colls* v. *Coates*, *suprà ; Chapman* v. *Bowlby*, 8 M. & W. 250.

[d] *Davies* v. *Edmonds*, 1 D. & L. 396.

[e] *Earle* v. *Plummer*, 1 Salk. 332; *Bullen* v. *Ansley*, 6 Esp. 111; *Rawstorne* v. *Wilkinson*, 4 M. & S. 250.

[f] *Woods* v. *Finnis*, 7 Exch. 370; *Gregory* v. *Sloman*, 1 E. & B. 368; *Wilbraham* v. *Snow*, 2 Wms. Saund. 47 *a*, n (1).

[g] Ib.; and *Dyke* v. *Mercer*, 2 Show, 394.

[h] *Gregory* v. *Sloman*, *suprà*.

[i] *Ante*, 103, 172.

[k] *Wooddye* v. *Coles*, Noy, 59; 3 Salk. 159.

[l] *Nil habet* is a good return, without saying *nec habuit post receptionem brevis*, or *nec habuit die quo*, &c., for that shall be intended. Dalt. ch. 36. When the return is in a convenient form it is indorsed on the writ itself; when not, these words are indorsed:—"*The execution of this writ appears in the schedule hereunto an-*

The answer of *G. A.* Esq. High Sheriff.

## *Nulla Bona Testatoris nec Propria.*

The within-named *C. D.* has no goods or chattels which were of the within-named *E. F.* at the time of his death in his hands to be administered in my bailiwick whereof I can cause to be made the sum within-mentioned or any part thereof;* and he has not any of his own proper goods or chattels in my bailiwick whereof I can cause to be made the within-mentioned sum of £—— parcel &c. or any part thereof according to the exigency of this writ.

The answer of *G. A.* Esq. High Sheriff.

## *The same with a Devastavit.*

The within-named *C. D.* has no goods or chattels &c. [*as before* *] but I do further certify and return that divers goods and chattels which were of the said *E. F.* at the time of his death to the value of the sum within-mentioned after the death of the said *E. F.* came to the hands of the said *C. D.* to be administered which said goods and chattels the said *C. D.* hath before the coming of this writ to me directed eloigned wasted and converted to his own use.

The answer of *G. A.* Esq. High Sheriff.

## *Fieri Feci.*

By virtue of this writ to me directed and delivered I have caused to be made of the goods and chattels of the within-named *C. D.* the sum within-mentioned which I have ready at the time and place within-mentioned to be rendered to the within-named *A. B.* as within I am commanded.

The answer of *G. A.* Esq. High Sheriff.

## *Fieri Feci as to Part and Nulla Bona as to Residue.*

By virtue of this writ to me directed and delivered I have caused to be levied of the goods and chattels of the within-named *O. D.* the sum of £—— which I

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*nexed,*" and the return itself is engrossed on a distinct panel. *Nulla bona* is the proper return when the person named in the writ has no property, either in fact or law, liable to be seized, *Shattock* v. *Carden*, 6 Exch. 725. It is also the proper return to a 2nd or subsequent writ, when the proceeds have been exhausted by a landlord's claim for rent, or by a writ or writs with priority, *Drewe* v. *Lainson*, 11 Ad. & E. 538; *Wintle* v. *Freeman*, ib. 539; *Heenan* v. *Evans*, 1 Dowl. N. C. 204. In *Smallcombe* v. *Olivier*, 13 M. & W. 91, between the delivery and return of the writ, the Court of Review had ordered that a fiat should be annulled if the L. Chancellor should think fit so to direct; the Sheriff returned *nulla bona;* and after this return the L. Chancellor made an order for annulling the fiat; it was held a good return. It would seem also to be the correct return where the defendant's goods are in a place where the Sheriff cannot execute the writ, as in Buckingham Palace and the like, *Winter* v. *Miles*, 10 East. 577. It would also seem a good return where the landlord claims his rent and the execution creditor (upon notice) refuses to pay it, *Cocker* v. *Musgrove*, 9 Q. B. 234. The Sheriff must return that there are goods, or that there are none, *bona aut nulla bona*, and no difficulties will excuse him, *Munk* v. *Cass*, 9 Dowl. 882.

[a] *Bromage* v. *Vaughan*, 7 Exch. 224.

have ready at the time and place within-mentioned to be rendered to the within *A. B.* in part satisfaction of his claim. And I do further certify and return that the said *C. D.* hath no goods or chattels within my bailiwick whereof I can cause to be made the residue of the said sum or any part thereof, as within I am commanded.

The answer of *G. A.* Esq. High Sheriff.

### *Fieri Feci and payments to Landlord and others.*[a]

By virtue of this writ to me directed and delivered I have caused to be made of the goods and chattels of the within-named *C. D.* the sum of £—— part whereof viz. £—— I have paid to Sir *G. M.* Baronet the landlord of the premises whereon the said goods and chattels were seized for rent due to him for the said premises at —— last [£—— other part thereof to one *J. B.* which I was commanded to levy for him of the said *C. D.'s* goods and chattels within my bailiwick by a writ of fi. fa. delivered to me before the delivery of the one at the suit of the said *A. B.* to wit on the —— day of —— A.D. 18— £——other part thereof to one *X. Y.* which I was commanded to levy for him of the said *C. D.'s* goods and chattels within my bailiwick by a certain other writ of fi. fa. delivered to me before the delivery of the one at the suit of the said *A. B.* to wit on the —— day of —— A.D. 18— £—— further part thereof I have paid to *E. F.* for Queen's taxes due and owing to her Majesty from the said *C. D.* for and in respect of the said premises] and £—— further part thereof I have retained for poundage and expenses and £—— residue thereof I have ready at the time and place within-mentioned to render to the said *A. B.* in part satisfaction of his said debt and interest: And I do hereby further certify and return that the said *C. D.* hath no goods or chattels in my bailiwick whereof I can cause to be made the residue of the said sum or any part thereof as within I am commanded.

The answer of *G. A.* Esq. High Sheriff.

### *Fieri Feci, and that the goods remain in his hands for want of Buyers.*[b]

By virtue of this writ to me directed and delivered I have taken goods and chattels of the within-named *C. D.* to the value of £——[b] which remain in my hands for want of buyers therefore I cannot have the money or any part thereof at the time and place within contained as I am within commanded.

The answer of *G. A.* Esq. High Sheriff.

### *When part has been sold and the rest remain in hand, &c.*

By virtue of this writ to me directed and delivered I have taken goods and chattels of the within-named *C. D.* to the value of £—— within-mentioned and have sold thereof to the value of £—— which money I have ready at the time and place within contained but the residue of the said goods and chattels remain in my hands for want of buyers.

The answer of *G. A.* Esq. High Sheriff.

### *Fieri Feci on Goods for part and Money and Bank Notes for residue.*

By virtue of this writ to me directed I have caused to be made of the goods and chattels of the within named *C. D.* the sum of £—— which money I have ready at the time and place within contained to render to the said *A. B.* in part of the sum within mentioned: And I further certify and return that I have taken the sum of £—— in money and a certain bank note for the payment of the sum of £—— [*or* "divers bank notes for the payment of divers sums of money amounting to the sum of £——"] which money and bank note [*or* "bank notes"] I have paid and delivered to the said *A. B.* for the residue of the sum within-mentioned according to the form of the statute in such case made and provided.[a]

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[a] *Cocker* v. *Musgrove*, 9 Q. B. 234.

[b] This is not a discharge of the command of the writ, but only an excuse that he has not the money, *Clerk* v. *Withers*, 6 Mod. 299. He must return some value (*value unknown* will not do); but he must be very careful, because although not estopped or bound by the precise value set upon them, the return will be *primâ facie* evidence against him afterwards, *Barton* v. *Gill*, 12 M. & W. 315; *Wintle* v. *Chetwynd*, 7 Dowl. 554; *Chambers* v. *Coleman*, 9 ib. 594; formerly he seemed bound by his return, see *Clerk* v. *Withers*, in this respect.

The answer of *G. A.* Esq. High Sheriff.

## *Where Bills of Exchange, &c. are taken.*

By virtue of this writ to me directed I have caused to be made of the goods and chattels of the within-named *C. D.* the sum of £—— which money I have ready at the time and place within contained to render to the said *A. B.* in part of the sum within-mentioned: And I further certify and return that I have seized and taken a certain bill of exchange for the payment of the sum of £—— [*or* "cheque," *or* "a certain promissory note for the payment of the sum of £——" *or* "a certain bond conditioned for the payment of the sum of £—— and interest" *or* "a certain specialty containing a covenant for the payment of the sum of £——" *as the case may be*] belonging to the within-named *C. D.* which said bill &c. [*as the case may be*] I hold as a security for the amount of the residue of the said sum in the said writ mentioned according to the form of the statute in such case made and provided.[a]

The answer of *G. A.* Esq. High Sheriff.

## *Withdrawal of Writ.*[b]

I do hereby certify and return that after the coming of this writ to me directed that is to say on the —— day of —— A.D. —— I was commanded by the within-named *A. B.* [*or* "by one *E. F.* the attorney of the within-named *A. B.*"] to forbear [*or* "suspend"] the execution thereof and have forbore [*or* "suspended"] the execution thereof accordingly.

The answer &c.

## *Mandavi Ballivo, &c.*

By virtue of this writ to me directed I made my mandate to the bailiff of —— of his liberty of —— who hath the execution and return of all writs and process within the said liberty and without whom no execution of this writ could be made by me within the same which said bailiff hath not given me any answer thereto [*or* "hath answered me thus that by virtue of my said mandate to him thereupon directed he hath caused to be made of the goods and chattels of the within-named *C. D.* the sum within mentioned and that he hath that money ready at the time and place within contained as by my said mandate he was commanded"].

The answer of *G. A.* Esq. High Sheriff.

## *Bill of Sale from Sheriff.*

To all to whom these presents shall come greeting: Whereas by virtue of her Majesty's writ of *fieri facias* issued out of the Court of —— at W. to me directed and delivered I was commanded to make £—— [*as in writ*] of the goods and chattels of *G. T.* which *A. B.* in the said court hath recovered against him as by the said writ more fully and at large appears: By virtue whereof I *G. A.* High Sheriff of the county of W. have taken into my hands the following goods and chattels [*here set them out*] of the said *G. T.* of the value of £——: And whereas the said

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[a] See *ante*, p. 174.

[b] *Hunt* v. *Hooper*, 1 D. & L. 626: and see *Howard* v. *Canty*, 2 ib. 117; *Barker* v. *St. Quintin*, 1 ib. 542; *Levi* v. *Abbott*, 4 Exch. 590; *ante*, p. 179, 180.

*A. B.* hath agreed to purchase and hath purchased the same for the sum of £——: Now know ye that I the said *G. A.* for and in consideration of the sum of £—— to me in hand well and truly paid by the said *A. B.* the receipt whereof I do hereby acknowledge do hereby as much as in me lieth by virtue of my said office fully and absolutely bargain sell and deliver to the said *A. B.* his executors administrators and assigns the said goods and chattels to have hold and enjoy the same as his her and their own proper goods and chattels for ever. In witness whereof I have hereunto set my hand and seal the —— day of —— A.D. ——.

Signed sealed and delivered
in the presence of me ——
——.

*G. A.*

## *Bond of Indemnity for Selling.*

Know all men by these presents that we *A. B.* of —— *J. B.* of —— and *R. P.* of —— are held and firmly bound to *G. A.* Esq. High Sheriff of the county of W. in the penal sum of £—— [*double the sum indorsed on the writ*] of good and lawful money of Great Britain to be paid to the said Sheriff or his certain attorney executors administrators or assigns for which payment to be well and faithfully made we bind ourselves and every one of us by himself for the whole and every part thereof and the heirs executors and administrators of us and every of us firmly by these presents.

Sealed with our seals. Dated this —— day of —— A.D. ——.

Whereas the above-named *G. A.* as High Sheriff of the county of W. by virtue of her Majesty's writ of *fieri facias* to him directed and delivered against the goods and chattels of *G. T.* issued at the suit of the said *A. B.* out of H. M. Court of —— at W. and there returnable immediately after the execution thereof hath seized and taken divers goods and chattels in execution; and whereas since the seizing and taking of the said goods and chattels in execution as aforesaid the same have been claimed by one *J. C.* who hath given notice to the said Sheriff not to proceed to a sale of the said goods and chattels; and whereas the said *A. B.* hath applied to the said Sheriff and requested him to sell the said goods and chattels so seized as aforesaid and to pay to the said *A. B.* the money arising from the sale thereof which the said Sheriff has consented to upon being indemnified for so doing: Now the condition of the above-written obligation is such that if the above-bounden *A. B.*, *J. B.* and *R. P.* their heirs executors or administrators do and shall from time to time and at all times hereafter well and sufficiently save harmless and keep indemnified the said Sheriff his Under-sheriff deputy and officers and each and every of them of from and against all losses costs charges damages and expenses which he or they shall or may sustain suffer bear pay expend or be put unto for or by reason or means of selling the said goods and chattels so seized and taken in execution as aforesaid; and also of from and against all action and actions suit and suits or any proceeding or proceedings at law or equity which now are or shall or may at any time or times hereafter be brought commenced or prosecuted rightfully or wrongfully against the said Sheriff his Under-sheriff deputy and officers or any or either of them for or by reason or means of the selling the said goods and chattels or for or by reason or means of any other matter or thing whatsoever relating thereto then the above-written obligation to be void otherwise to stand and remain in full force vigour and effect.

Signed sealed and delivered
in the presence of me
—— of ——.

*A. B.*
*J. B.*
*R. P.*

## *Condition of Bond for withdrawing.*

Whereas the above-named *G. A.* as High Sheriff of the county of W. by virtue of her Majesty's writ of fieri facias to him directed and delivered against the goods and chattels of *G. T.* issued at the suit of *A. B.* out of H. M. Court of —— at W. and there returnable immediately after the execution thereof hath seized and taken divers goods and chattels in execution; and whereas since the seizing and taking of the said goods and chattels in execution as aforesaid the same have been claimed by one *J. C.* who hath given notice to the said Sheriff not to proceed to a sale of them;

and whereas the above-named *J. C.* hath applied to the said Sheriff and requested him to abandon the possession of the said goods and chattels and to return *nulla bona* which the said Sheriff hath consented to do upon being indemnified: Now the condition of the above-written obligation is such that if the above-bounden *J. C.* and *X. Y.* their heirs executors or administrators do and shall from time to time and at all times hereafter well and sufficiently save harmless and keep indemnified the said Sheriff his Under-sheriff deputy and officers and each and every of them of from and against all losses costs charges damages and expenses which he or they shall or may sustain suffer bear pay expend or be put unto for or on account or by reason of abandoning the possession thereof and returning *nulla bona* to the said Court; and also of and from and against all action and actions suit and suits or any proceeding or proceedings at law or equity which now are or shall or may at any time or times hereafter be brought commenced or prosecuted rightfully or wrongfully against the said Sheriff his Under-sheriff deputy and officers or any or either of them for or on account or by reason of abandoning the possession and returning *nulla bona* or for or on account or by reason of any other matter or thing whatsoever relating thereto then the above-written obligation to be void otherwise to stand and remain in full force vigour and effect.

Signed sealed and delivered in the presence of me —— of ——. } *J. C.*
*X. Y.*

## *Venditioni Exponas.*[a]

Victoria &c. Whereas by our writ we lately commanded you that of the goods and chattels &c. [*recite fi. fa. to the end*] and you on —— returned to us [*C. P.* "to our justices," *Exch.* "to our barons"] at W. that by virtue of the said writ to you directed you had taken goods and chattels of the said *C. D.* to the value of the said sum therein mentioned which goods and chattels remained in your hands for want of buyers and that therefore you could not have the money before us [*C. P.* "before our said justices," *Exch.* "before our said barons"] at the time and place therein contained as you were thereby commanded. Therefore we being desirous that the said *A. B.* should be satisfied his said claim command you that you expose to sale and sell or cause to be sold the said goods and chattels of the said *C. D.* so by you taken as aforesaid for the best price you can get for the same and at least for the said sum of £——; and have the money arising from such sale before us [*C. P.* "before our justices," *Exch.* "before our barons"] at W. immediately after the execution hereof to render unto the said *A. B.* for his said claim [*Exch.* "to be then and there paid to the said *A. B.* or his attorney in this behalf"] and have you there then this writ. Witness &c.

## SECTION IV.

### LEVARI FAC.

THIS, says Gilbert,[b] is the most ancient judicial process of the law, though it now continues only in three cases; viz. in the county and manor court, recognizances in chancery, and a recovery against the heir on the lands of his ancestor by descent. This process appears in the books under several names, but still amounts to the same thing; in mesne process it is called an attachment of goods and distress infinite; but in executions it is always called a *levari;* and it is to be known that the executions at common law were only a pain or seizure to compel the party to do the thing commanded, and the command to levy the money adjudged was only a command to distress the parties in their goods and chattels, lands and tenements, till they had obeyed; so that the words of the old writ are:—*Præcipimus tibi quod distringas B. per terras, et catalla, ita quod nec ipse nec aliquis pro eo nec per ipsum manum apponat terris, tenementis, bladis nec aliis catallis.* Or thus:—*Ita distringas eum per terras et catalla quod capias omnes terras et omnia catalla sua in manum domini regis, et ea detineas quousque rex aliud inde præceperit et de exitibus respondeat domino regi.* And in this case they at last came in the king's courts to give more effectual remedy than was given in any other, *adjudicare querenti debitum petitum.* From hence in executions they went one step further, to command the Sheriff to levy a certain sum mentioned in the judgment, by which the Sheriff had authority not only to seize (which was done at common law), but likewise to sell the goods so levied in order to pay the plaintiff his money; and this more modern way of transacting the *levari* is what still continues in the superior Courts, as being the most commodious; but in the inferior, where they cannot alter the property, the ancient way of levying as a pain continues to this day. And if the Sheriff in the king's Court cannot on the *levari* find buyers, there shall issue a second *levari* to levy the money for the goods so taken, and the residue from the other goods of the defendant. We will now see—1st. How the *levari* stood in the Court of the manor, or Hundred Court;[a] and here the *levari* is only a pain to make the party perform the judgment, and the Sheriff cannot in such case deliver the goods to the party, as he can in the king's Court, but the goods must be kept in safeguard till the defendant has satisfied the plaintiff the condemnation money, unless it be, where there is a prescription to issue a *levari,* and thereon to sell the goods, as often there is in the king's hundred;[b] and if there be a writ *de executione faciendâ,* the Sheriff or bailiff of the hundred may sell the goods so taken by distress. And so if a debt be acknowledged in the Sheriff's Court, the Sheriff may sell on a *recognoscat;* but in mesne process the goods are not forfeited on the *levari* in the lord's court, as we have already taken notice of in title *Replevin.* 2nd. This sort of *levari* is on a recognizance in the High Court of Chancery, and is returned into the Court of Chancery, because it is an old original writ, that issued upon a recognizance made to the king, or to the party in that Court, which, running in the form of a *levari,* was not altered when the stat. Westm. 2nd, 13 Edw. 1, c. 18, broke the executions into two distinct forms of *fieri facias* and *elegit;* and so it continued afterwards that the *fieri facias* and *elegit* were judicial writs in the other courts; but the original *levari* still remained in the Court of Chancery, being not removed, altered or taken away by that statute. But the *fieri facias* and *elegit* being a much better manner of execution, the *levari* became obsolete in the other Courts, though they used the *elegit* in the chancery, upon the words of Westm. 2nd, *si debitum fuerit recognitum in curia regis.* But though on the *levari* they anciently sold the goods in the Court of the king, and assigned them over sometimes to the party *secundum quantitatem debiti;* yet they had not used the way of appraisement. But the statute of Acton Burnel, 13 Edw.,[a] was the first that put this in practice, which says that the goods should be appraised and delivered over to the party according to the appraisement; this succeeded so well, that by the statute of Westm. 2nd, c. 1, they used it in all cases, either to sell them upon the *fieri facias* or to deliver the goods at a price upon the *elegit;* and from henceforward the *levari* was of no use but as an original writ issuing out of chancery. We must here note that no *ca. sa.* lies on recovery upon this recognizance, because the debtor, by the very words of the recognizance, has subjected his goods, lands and chattels only, not his person. 3rd. The special *levari* against the heir, where the lands are delivered to the creditor at a price *donec debitum inde levaveret;* and this is where the heir confesses the debt, and the particulars of the assets descended; and this seems to be a writ formed by the judges upon the model of Acton Burnel and the *elegit;* but it is properly a writ at common law, and therefore is rather a special *levari* to levy the debt upon the lands than an *elegit*, though some time by the books called a special *elegit;* the value of the lands being to be set by a jury, and is properly called so at common law, because it was formed in this case by the judges to give a remedy in case that was out of those several statutes. For where a man binds himself and his heirs, the heir being named in the obligation, is obliged as well as the ancestor, and therefore, if he says nothing, or pleads a false plea, he makes the debt his own; because he is presumed to have received the value of the obligation. But since he is only debtor in respect of the land, therefore if he confesses the debt, and shows the creditor the land which is his debtor, he discharges his own person and effects, since he gives up that to the creditor for which he is bound in that obligation. And hence on this case the judges had authority to make out such writs, because the heir in his plea set forth the land subject to the debt.

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[a] The *venditioni exponas* is not a power or authority to sell, but a command to do that which he had power and ought to do before. It is a branch of the fi. fa. and not distinct process, *Hughes* v. *Rees*, 4 M & W. 468. It is compulsory upon him to sell under this writ under the penalty of forfeiting issues to the amount of the debt, *Clerk* v. *Withers*, 6 Mod. 297. As he is bound to sell under the fi. fa. within a reasonable time, without a *venditioni exponas*, this writ seldom issues. Besides, a rule to return the writ has practically like results, and is less expensive.

[b] Gilbert's Law of Exon. p. 27. The *levari* is now obsolete, except in outlawry, the *fieri facias* and *elegit* being much better modes of execution. But the information here bequeathed to us is still most valuable. See *Underhill* v. *Devereux*, 2 Wms. Saund. 68; *Britton* v. *Cole*, 12 Mod. 177.

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[a] Kitch. 227.

[b] 2 Lut. 1371; Dalt. Sher. 442.

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[a] This is a mistake; for the stat. of Acton Burnel is the 11 Edw. I., and not the 13 Edw. I.; but as the latter recites and incorporates the former, it is of no moment. See Statutes at Large, 8vo edit., 11 Edw. I. n.

## SECTION V.

## ELEGIT.

It is a *judicial* writ, and lies to recover the fruits of a judgment in a personal action or upon a recognizance in any Court.[a] It was given by the Stat. of Westm. 2 (13 Edw. 1, c. 18); it was afterwards, by the Stat. of Frauds (29 Car. 2, c. 3), and the 1 & 2 Vict. c. 110, enlarged from *legal* to *trust* estates, and from a *moiety* to the *whole* of the debtor's lands, and as to the period of time when the judgment began to operate upon them.[b]

In case of death of one of several debtors.

In *Green* v. *Ackland*,[c] there is this valuable note:—"But although the judgment survives as to the *personalty*, yet it does not as to the *real* estate; for at common law the plaintiff might take the goods of the survivor in execution by a fi. fa.; but the plaintiff, under the Stat. of Westm. 2, must sue out an *elegit* against the lands of the survivor, and also of the heir and tertenants of the deceased; and must sue out a sci. fa. against the survivor and the heir and tertenants of the deceased. For it seems that where the lands of several are charged with a debt, it shall not lie wholly upon the survivor; as if a recognizance be acknowledged by several, the lands of them all are thereby become chargeable, and execution must be equally made; and if one dies, the creditor must bring a sci. fa. against his heir and tertenants, and also against the survivors. But it is otherwise where the lands are not bound; as if two enter into a bond, and one dies before judgment, the survivor shall be charged alone. So where judgment in debt was had against two, one died, the plaintiff brought sci. fa. against the survivor only; the defendant pleaded that the other had left lands and an heir upon whom they had descended, and demanded judgment if he should be compelled to answer without the heir being warned; to which the plaintiff demurred, and judgment was given that the defendant should answer; for the judgment is against the person; and although now by the Stat. of Westm. 2, which gives the sci. fa. and elegit, he may charge the lands and make the judgment real, yet it is at his election to proceed against the personalty if he will; but if he will take out execution upon the real lien, the charge must be equally against both, and the sci. fa. against both. But it was said, that if he brings sci. fa. against both, and has judgment upon it, he may have a fi. fa. against the survivor only, or an elegit against both."

### *Indorsement of Common Law Writ.*

Levy £——; also poundage[d] fees and expenses of execution.
The defendant is a [baker] and resides at ——.

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[a] Co. Litt. 289 b; Dalt. ch. 28; Gilb. Exon. 32.

[b] *Ante*, p. 157; as to the direction, teste, form of writ, &c., see Reg. Gen. Hil. T. 1853, r. 70, &c.; 15 & 16 Vict. c. 76, s. 121–5.

[c] 2 Wms. Saund. 50 *a*, n. (4).

[d] Under 3 Geo. 1, c. 15, s. 16, the

### *Indorsement of Chancery Writ.*

By the Court.

[*The calling and place of residence of the party against whom the writ is issued, thus:*—"*C. D.* of —— in the county of —— miller."]

[*Names and addresses of agent and solicitor issuing writ.*]

Levy £—— and interest thereon from the —— day of —— 18— together with Sheriff's poundage officer's fees and all other incidental expenses.[a]

### *Sheriff's Warrant to take Defendant's Goods.*

*W.* to wit. Sir *G. M.* bart. Sheriff of the county of *W.* aforesaid to *T. D.* and *R. B.* my bailiffs greeting: By virtue of the writ of elegit to me directed and delivered I do hereby command you and each of you jointly and severally to seize and take all the goods and chattels of *C. D.* (except his oxen and beasts of the plough) in my bailiwick so that I may cause the same to be delivered to *A. B.* as by the said writ I am commanded and forthwith certify the same to me. Given under the seal of my office this —— day of —— A.D. 18—.

—— Sheriff.[b]

How executed.

The Sheriff himself cannot appraise the goods; nor value and extend the lands upon an elegit; the appraising of the goods and the extent (or valuation) of the lands must be, *per sacramentum duodecim proborum et legalium hominum*, &c. He cannot, under this writ, deliver any goods in execution, or extend any lands, but such as are appraised and valued by the jurors of the inquisition.[c] By command of the writ, he is to charge a jury to make inquiry thereof; and the Sheriff and jury may go to the house or ground to be extended, or where the goods to be appraised are, and there may appraise and value the same, and may go into the house for that purpose if the door be open.[d] Upon receipt of the writ he appoints a time for its execution, and impanels a jury for the purposes mentioned in the writ, as on a writ of inquiry. On the day, and at the time and place appointed for the inquiry, the execution creditor, or his attorney, attends with his witnesses and documentary evidence (as the case may be) to show what goods and chattels the defendant has, and their value: also what lands, and the nature of their tenure and yearly value.[e] The inquisition is prepared beforehand, on parchment, with seals, &c., ready for execution by the Sheriff and Jury, as soon as the blanks can be filled up by a finding of the facts. No notice need be given to the debtor.[f]

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Sheriff, as regards the *real estate*, is entitled to twelvepence in the pound, to be calculated upon the *yearly value* of the lands extended, (*and not on the sum to be levied under the writ, Nash* v. *Allen*, 1 Dav. & M. 16,) if such yearly value exceed not the sum of 100*l.*, and sixpence in the pound above. On goods he is entitled as on a fi. fa.

[a] *Ante*, p. 193, n. (*d*).

[b] For warrant to bailiff of liberty, see *Boothman* v. *Earl of Surry*, 2 T. R. 5; *Jackson* v. *Hill*, 10 Ad. & E. 485.

[c] 4 Co. 74: Dyer, 100 a; Dalt. ch. 28, 58; 2 Wms. Saund. 69 c.

[d] *Semayne's ca.* 5 Co. 91. Dalt. 134, adds, "but he may not break open the gates or doors, &c.;" but this seems not accurate as to *gates*, see p. 181.

[e] *Ante*, p. 171.

[f] 2 Wms. Saund. 69 *c*, n. (2).

## *Charge to the Jury.*

Your charge is to inquire what goods and chattels (except oxen and beasts of the plough) *C. D.* was possessed of on the —— day of —— A.D. 18—[a] or at any time afterwards in my bailiwick and the value thereof; your charge also is to inquire what lands tenements rectories tithes rents and hereditaments including lands and hereditaments of copyhold or customary tenure *C. D.* or any one in trust for him was seised or possessed of on the —— day of —— A.D. ——[b] or at any time afterwards or over which the said *C. D.* on that day or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit and also to inquire and say what is the yearly value thereof that the same may at a reasonable price and extent be delivered to *A. B.* to hold the said goods and chattels as his own proper goods and chattels and to hold the said lands tenements rectories tithes rents and hereditaments respectively according to the nature and tenure thereof to him and his assigns until the said sum of £—— together with interest as aforesaid shall have been levied.

## *Juryman's Oath and Affirmation.*[c]

You shall well and truly try what goods and chattels (except his oxen and beasts of the plough) *C. D.* was possessed of on the —— day of —— A.D. 18—[a] or at any time afterwards in my bailiwick and the value thereof. You shall also well and truly try what lands tenements rectories tithes rents and hereditaments including lands and hereditaments of copyhold or customary tenure *C. D.* or any one in trust for him was seised or possessed of on the —— day of —— A.D. 18—[b] or at any time afterwards or over which the said *C. D.* on that day or at any time afterwards had any disposing power which he might without the assent of any other person exercise for his own benefit and the yearly value thereof and a true verdict give according to the evidence.

So help you God.

What extendible.

Now let us see what is extendible. The Stat. of Westm. the 2nd uses the word *catalla*, not *bona et catalla*. However, as already observed,[d] the distinction is one well nigh without a difference. It should also be observed that the Stat. of 1 & 2 Vict. c. 110, s. 12, which gives the Sheriff power to seize bank notes, bills of exchange and the like, applies only to a *fieri facias*. Independently, therefore, of the consideration that a *fi. fa.* is executed by *sale*, and an elegit by appraisement and delivery only, a fi. fa. should, for many reasons, be first resorted to.[e] But let us suppose an *elegit* sued out in the first instance; what is extendible under it, and what not?

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[a] The day when the writ was delivered to him or his deputy for execution.

[b] The day of the entry of judgment, or date of order, decree, &c.

[c] For Quaker's affirmation and witness's oath or affirmation, see *ante*, p. 69, 70.

[d] *Ante*, p. 173.

[e] There are authorities which seem to show, that if the Sheriff delivers to the plaintiff a term at a value in gross, the property is altered by the delivery, and on a reversal or the like the restitution is not of the term or chattel in specie, but its value, as in a fieri facias, *ante*, p. 184; 2 Wms. Saund. 69; Gilb. Ex. 34, and cases cited. They admit that if delivered at an annual value, and not at a value in gross, the term is to be restored, ib. The question seems only to have arisen about a *term*, and not about any other chattel, real or personal.

The answer is, all the goods and chattels of the debtor, not being *bona ecclesiastica* (except oxen and beasts of the plough): if these be sufficient the lands are not to be extended.[a] The legal import of these words, *bona et catalla*, has been already defined.[b] The whole of his real property (except the benefice, including the glebe, of a parson or vicar), whether in fee, in tail, in severalty, joint tenancy, tenancy in common, coparcenary, for life, for years, copyhold, customary, or in reversion; whether tenements, rectories, tithes,[c] rents or hereditaments, legally vested in him or of which any other person in trust for him shall have been seised or possessed of at the time of entering up the judgment or at any time afterwards, or over which such person shall at the time of entering up such judgment or at any time afterwards have any disposing power which he might without the assent of any other person exercise for his own benefit.[d] So may the wife's lands, which the husband has during coverture.[e] *Land,* says Blackstone,[f] "comprehends all things of a permanent substantial nature; being a word of a very extensive signification. *Tenement* is a word of still greater extent, and though, in its vulgar acceptation, it is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies everything that may be *holden*, provided it be of a permanent nature; whether it be of a substantial, and sensible, or of an unsubstantial ideal kind. Thus *liberum tenementum*, frank tenement or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like: and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. But *hereditament,* says Sir Edward Coke, is the largest and most comprehensive expression: for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed.[g] Thus an heir-loom, or implement of furniture, which by custom descends to the heir, together with an house, is neither land nor tenement, but a mere moveable: yet being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also a hereditament. Hereditaments, then, to use the largest expression, are of two kinds, corporeal, and incorporeal. Corporeal consist of such as affect the senses; such as may be seen, and handled, by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation. Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke, comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includes also all castles, houses, and other buildings: for they consist of two things; *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passes with it. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, for so many cubical yards; or, by superficial measure, for twenty acres of water; or, by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. For water is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain substantial property, of which the law will take notice, and not of the other. Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum,* is the maxim of the law upwards; therefore, no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word 'land' includes not only the face of earth, but everything under it or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which, nothing passes but a right of fishing: but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum*, everything terrestrial will pass." The judgment binds the lands, &c., *at and from the time of entering up the judgment*;[a] therefore, if the defendant alien them, they may, after such alienation, be extended in the hands of the alienee. If there be several alienations, the judgment equally binds them all, and all must be equally contributory;[b] the execution ought not to be laid on one only. If the defendant alien a part only of the lands, the plaintiff may extend what remains in his hands, without going to the lands of the alienee. If there be judgment against two, the lands of one may be extended, and that will be a satisfactory execution.[a] If a person, charged in execution, die, his lands, tenements and hereditaments may be extended, after his death, just as if he had never been charged in execution, except lands, tenements, and hereditaments, *bonâ fide* sold, after judgment, for the benefit of a creditor, and paid by him, or secured to be paid, to any of his creditors, with their privity and consent.[b]

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[a] 2 Inst. 395; Vin. Ab. Exec. (M).

[b] See p. 173.

[c] See a most valuable note in Tidd's Pr. Forms, 8th edit. 385 n.

[d] 1 & 2 Vict. c. 110, s. 11; Burton's Real Prop. s. 874.

[e] Dalt. 136.

[f] 2 Bl. Com. 16.

[g] See also Sheph. Touch., edit. Preston, p. 91; Burton's Real Prop. s. 1, &c.

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[a] *Ante*, p. 157.

[b] If he omit any, the elegit may be avoided on an *audita querelâ* or on motion; 2 Inst. 395; *Harbert's ca.* 3 Co. 11.

What not extendible.

Let us now inquire into what cannot be extended. The best general rule, in respect of goods and chattels, seems to be, that whatever may or may not, at common law, be levied upon under a *fieri facias*, may or may not be delivered under an elegit. Money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, are made subject to a *fieri facias* by the 1 & 2 Vict. c. 110, s. 12, but the stat. does not apply to an *elegit;* and, therefore, such things cannot be extended under it. Nor is a mere *chose in action* extendible;[c] nor it seems a bare rent, as a rent seck;[d] nor anything which cannot be granted and assigned, as the office of filacer, the half pay of an officer, or the like.[e] So a trust, created by a defendant in favour of himself, *and* another person, was held to be a trust not within 29 Car. 2, c. 3, s. 10; that clause being confined to cases where the trustees are seised or possessed in trust for a defendant alone, and not jointly with another person.[f] *Bona ecclesiastica* are not extendible under this writ;[g] nor an advowson in gross;[h] nor the glebe belonging to the parsonage or vicarage, nor to the churchyard.[i] Nor a term, in right of the wife as administratrix, for the debt of the husband.[k] Again, if a man be disseised, against whom judgment is recovered, the lands in the hands of the disseisor shall not be liable; for though the disseisee has the right of possession, yet they are not his until recovered.[l] So, if a feoffment be upon condition, and the feoffee acknowledge a statute, and the condition be broken, the feoffee shall enter into the lands freed of the charge of the statute, because he comes in by a prior title, and the feoffee hath no right to the lands, not having performed the condition upon which the lands were given him.[m]

*Legal* possession only given.

The Sheriff delivers *legal* possession, leaving the plaintiff to recover *actual* possession. It is said that the plaintiff may assert his right of entry without ejectment, provided he can do so without such acts of violence as will subject him to a criminal prosecution.[a] The rule, perhaps, may be more correctly stated thus:—When the debtor himself is in possession, the Sheriff may give actual possession, or the plaintiff may enter, if he can do so peaceably; but where there exists an elder title, as where the land is under a previous demise, then he would be a trespasser, if he attempted to disturb it by actual entry.

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[a] Gilb. 41, 52; 1 Roll. Abr. 896 (F).

[b] 21 Jac. 1, c. 24.

[c] *Sharp* v. *Key*, 8 M. & W. 379.

[d] *Walsal* v. *Heath*, Cro. Eliz. 656; Vin. Ab. Exec. (M).

[e] Dyer, 7.

[f] *Doe* d. *Hull* v. *Greenhill*, 4 B. & A. 684: see also *Harris* v. *Booker*, 4 Bing. 99.

[g] See Tidd's Prac. Forms, 8th edit. 385 n.

[h] Gilb. 39; Vin. Ab. Exec. (M).

[i] Gilb. 40; 3 B. & P. 327.

[k] *Ridler* v. *Punter*, Cro. Eliz. 292.

[l] Vin. Ab. Exec. (M); Gilb. 42.

[m] Gilb. 42.

**Writ must be returned.**

The elegit and inquisition must be returned and filed when land is extended, otherwise the tenant by elegit has no title.[b]

### *Return of Nihil.*[c]

The within-named *C. D.* had not nor hath any goods or chattels in my bailiwick nor had nor hath he or any person in trust for him any land tenement rectory tithe rent or hereditament in my bailiwick nor any disposing power over any such land [&c.] in my bailiwick which I can cause to be delivered to the said *A. B.* by a reasonable price and extent as within I am commanded.

The answer of —— High Sheriff.

### *Delivery of Goods and no Lands.*

By virtue of this writ to me directed I have caused to be delivered to the within named *A. B.* all the goods and chattels of the within-named *C. D.* in my bailiwick (except his oxen and beasts of the plough) at the price of £—— to hold the said goods and chattels as his proper goods and chattels in part satisfaction of the sum and interest within mentioned: And I do further certify and return that the said *C. D.* had not nor hath he nor had nor hath he or any person in trust for him any land tenement rectory tithe rent or hereditament in my bailiwick nor any disposing power over any such land [&c.] in my bailiwick which I can cause to be delivered to the said *A. B.* for the residue of the said sum and interest or any part thereof as within I am commanded.

The answer &c.

### *Where Lands are delivered.*

By virtue of this writ to me directed I have caused to be delivered to the within-named *A. B.* at a reasonable extent all the lands which the said *C. D.* hath in my bailiwick. And I do further certify and return that the said *C. D.* had not nor hath any goods or chattels within my bailiwick nor any tenements &c. [*as before*] which I can cause to be delivered to the said *A. B.* as within I am commanded.

The answer &c.

The execution of this writ appears in the inquisition hereunto annexed.

The answer &c.

### *Inquisition.*

W. to wit. An inquisition indented taken at —— in the county of *W.* the —— day of —— A.D. 18—before me —— Sheriff of the county aforesaid by virtue of the writ of our lady the Queen to this inquisition annexed by the oath of *J. B.* [&c.] twelve honest and lawful men of the county aforesaid who being duly impannelled drawn by ballot and sworn say upon their oaths that the said *C. D.* on the ——

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[a] *Jayson* v. *Rash*, 1 Salk. 209; *Taylor* v. *Cole*, 3 T. R. 295; *Rogers* v. *Pitcher*, 6 Taunt. 202: see also *Newton* v. *Harland*, 1 Sc. N. C. 474; 2 Wms. Saund. 69 *f*; *ante*, p. 183.

[b] 2 Wms. Saund. 69 *e*; and the defendant may compel the plaintiff to enter them on the roll; *Casseldine* v. *Munday*, 2 Dowl. P. C. 169.

[c] The inquisition need not be remitted with this return; *Stonehouse* v. *Ewen*, 2 Str. R. 874.

day of —— A.D. 18—[a] was possessed of his own right of the goods and chattels following, that is to say —— of the value or price of £—— which said goods and chattels I the said Sheriff have caused to be delivered to the said *A. B.* to hold the said goods and chattels as his own proper goods and chattels in part satisfaction of the sum and interest in the said writ mentioned.[b] And the jurors aforesaid upon their oath further say that the said *C. D.* [*or* "one *W. C.* in trust for the said *C. D.*"] was on [&c.][c] seised in his demesne as of fee of and in a dwelling house and farm with the appurtenants commonly called or known by the name of *P*——[d] situate and being in the parish of —— in the county aforesaid; that is to say one messuage fifty acres of arable land &c. of the clear yearly value of £—— in all issues beyond reprizes [*or* "of freehold for and during the term of his natural life" *or* "of and in one undivided moiety of and in &c." *or* "in his demesne as of fee at the will of the lord according to the custom of the manor of —— in the county aforesaid"] *or* "that the said *C. D.* on &c. was seised as of fee and right [*or* 'of freehold for and during the term of his natural life'] of and in a certain rent charge [*or* 'annuity'] of £—— payable by four equal quarterly payments on &c. and charged and chargeable upon and issuing and payable out of certain lands and premises with the appurtenants situate and being in the parish of —— in the county aforesaid" *or* "that the said *C. D.* on &c. had a certain disposing power over (*stating the nature of the power*) which power he the said *C. D.* might without the assent of any other person have exercised for his own benefit" [*if in mortgage say* "which said &c. are subject to a certain mortgage to one *E. F.* of —— by indenture bearing date &c. subject to redemption on payment of £—— and interest at five per cent. per annum at a day mentioned"] which said —— I the said Sheriff on the aforesaid day of taking this inquisition have caused to be delivered to the said *A. B.* (subject as aforesaid *if in mortgage*) to hold according to the nature and tenure thereof to him and his assigns according to the form of the statute in such case made and provided until the sum and interest in the said writ mentioned shall have been levied: And lastly the jurors aforesaid upon their oath aforesaid say that the said *C. D.* in the said writ named on [&c.] had not any other or more goods or chattels in my bailiwick nor had he or any person in trust for him on [&c.] on which day the judgment aforesaid was entered up or at any time afterwards any other or more lands or tenements nor any rectory tithes rents or hereditaments in the county aforesaid whereof he the said *C. D.* &c. was seised or possessed at the time of entering up the said judgment or at any time afterwards nor had he the said *C. D.* at the time of entering up such judgment or at any time afterwards any other or more lands [&c.] in the county aforesaid over which he had any disposing power which he might without the assent of any other person have exercised for his own benefit to the knowledge of the said jurors. In witness whereof as well I the said Sheriff as the jurors aforesaid have set our seals to this inquisition on the day and year and at the place aforesaid.

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[a] *Ante*, p. 195, n. (*a*).

[b] If anything has been deducted for rent, taxes, or the like, state it as in fi. fa., *ante*, p. 187.

[c] *Ante*, p. 195 n. (*b*).

[d] As now the *whole* instead of a *moiety* is to be delivered, it is sufficient to describe it in any manner whereby the estate may be identified, *Doe* d. *Roberts* v. *Parry*, 13 M. & W. 358; *Sherwood* v. *Clark*, 15 ib. 766: and it would seem now for the same reason to be sufficiently certain to describe a term (without showing its beginning or end), as a "term of years yet to come." See 2 Wms. Saund. 68 *g*, 69. But the inquisition must be certain as to the locality of the lands where the inquisition is taken, the nature of the defendant's estate therein, and their value, ib. 70 *d*; *Sparrow* v. *Mattersock*, Cro. Car. 319; Moore, 8; Dyer, 208; *Semble*, such a degree of certainty as would do in a conveyance would suffice; 13 M. & W. 357. Before inquisition filed, the Court may examine it, and if they find fraud, partiality, &c., may stop the filing and award a new elegit, 2 Inst. 396; so if the lands are extended at an under value, Com. Dig. Exec. (C 14). If the return be void, the objection may be taken in an action of ejectment brought to recover actual possession, *Fenny* v. *Durrant*, 1 B. & A. 40: and see *Pullen* v. *Purbeck*, 12 Mod. 368. If voidable only, and not void, the Court will quash it, ib. The inquisition may be good in part and bad in part, see *Morris* v. *Jones*, 2 B. & C. 242; *Doe* d. *Roberts* v. *Parry*, 13 M. & W. 356.

**Satisfactory execution.**

**What writs may issue after.**

It seems formerly to have been held that the bare entry on the roll of a prayer of an elegit was a bar to all other executions, but this was after great consideration reversed.[a] The entry on the roll, therefore, of an award of an elegit is no longer a bar, and the plaintiff may issue a *ca. sa.* or *fi. fa.* if nothing be done, or returned, upon the elegit.[a] So if the Sheriff deliver goods to the plaintiff for part of the debt, and return *nihil* as to the land, a ca. sa. or another elegit, or a fi. fa. may issue for the residue, or he may have debt upon the judgment.[b] So if the return be that he cannot deliver the lands, because they are already extended, a ca. sa. or fi. fa. may afterwards issue.[c] Several elegits might, even before the *Common Law Procedure Act*, 1852, be awarded for the whole debt into different counties.[d]

**Interest of tenant by elegit.**

The words of the old writ of elegit were, as to lands, "*to hold as his freehold*," yet the interest which a tenant by elegit had was held not to be a freehold, but a chattel interest, which devolved upon his executors ;[e] but the writs published by the Judges, pursuant to *The Common Law Procedure Act*, 1852, use, instead, these words, "*to hold the said lands, &c., according to the nature and tenure thereof, to him and to his assigns according to the form of the said statutes until, &c.*," words seemingly more appropriate to the interest adjudged to him by the old authorities. The operative words in the Chancery precedents are nearly the same. A tenant by elegit has a right to distrain without attornment.[f]

The words of the Stat. of Westm. the 2nd are "*quousque debitum fuerit levatum*," which are construed to mean *be or might be levied;* for if the tenant by *elegit* neglect to take the profits it is all one; it seems, however, that the defendant cannot in such a case enter, but is put to his *sci. fa.*[g]

**Landlord's claim for rent, under 8 Anne, c. 14.**

By the statute of 8 Anne, c. 14, s. 1, no goods, &c., shall be liable to be taken by virtue of *any execution* on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises, by virtue of *such execution or extent*, pay to the landlord, not exceeding one year's rent.[h] There seems to be no doubt, therefore, that where goods are delivered under an elegit that the landlord is entitled to a year's rent, for the words are *any* execution or extent; indeed it would be at variance with the spirit of the Act that the landlord should be affected by the nature of the execution; that under a fi. fa. he should have a year's rent, but under an elegit not. But as under an elegit the Sheriff has no power to *sell*, but only to *deliver*, whence is the landlord's claim to come, or how is he to act? He should not, if the execution creditor (upon notice) refuse to satisfy the landlord's claim, deliver the goods, but return the facts; indeed, in such a case, the common return of *nulla bona* seems sufficient.[a]

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[a] See 2 Wms. Saund. 68 *d.*

[b] Ibid.

[c] Ibid.

[d] Ibid, 68 *c.*

[e] 1 Wms. Exors. 564.

[f] *Lloyd* v. *Davies*, 2 Exch. 103.

[g] See Dalt. ch. 28; 15 & 16 Vict. c. 76. s. 132.

[h] See *post*, "Removing without satisfying year's rent."

## Section VI.

### CAPIAS AD SATISFACIENDUM.

How given.

There was no *capias* for the debt or damage of a *subject* at common law (except in actions of trespass *vi et armis*); such process being at variance with the nature of the contract between the parties, the mild spirit of the common law, and in no less conflict with the stern relations of the feudal system.[b] The first alteration in the law seems to have been introduced by the Stat. of Marlbridge (52 Hen. 3, c. 23) in an action of account, and from that time to have been gradually enlarged to its present character.[c]

Nature of.

It is a *judicial* writ, issued at the instance of one who recovers in a personal action, debt, or damages, in the Queen's Courts.[d] It cannot, properly speaking (as Sir W. Blackstone says), be sued out against any but such as were liable to be taken upon the former *capias*.[e]

For what amount it may issue.

The sum recovered must exceed 20*l.*, exclusive of the costs recovered by the judgment.[f] A soldier or sailor in H. M. S. cannot be arrested for any original debt under 30*l.*[g]

Satisfactory execution, when.

It is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he make the satisfaction awarded; and, therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods.[h] It is, however, provided by 21 Jac. I. c. 24, that if the defendant die, while charged in execution, the plaintiff may, after his death, sue out a new execution, against his lands, goods, or chattels.

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[a] See *Riseley* v. *Ryle*, 11 M. & W. 16; *Cocker* v. *Musgrove*, 9 Q. B. 223.

[b] Dalt. ch. 29; *Foster* v. *Jackson*, Hob. 56; Doct. & Stud. 18; 3 Rep. 11; Co. Litt. 289 a; Gilb. 59–68.

[c] See 13 Edw. 1, c. 11; 25 Edw. 3, st. 5, c. 17; 19 Hen. 7, c. 9; 23 Hen. 8, c. 14, 15; 4 Jac. 1, c. 3; 8 & 9 Will. 3, c. 11.

[d] Co. Litt. 289 a.

[e] 3 Bl. Com. 414; *Cassidy* v. *Steuart*, 9 Dowl. 366; that is to say, as a general rule — but infants, *Dow* v. *Clark*, 1 C. & M. 860; and bail, *Goodchild* v. *Chaworth*, 2 Str. 1139, have been taken, and the Court refused to interfere in a summary way. Ibid.

[f] 7 & 8 Vict. c. 96, s. 57. See *Mason* v. *Nicholls*, 14 M. & W. 118; *Newton* v. *Conyngham*, 5 C. B. 751; *Walker* v. *Hewlett*, 6 D. & L. 732.

[g] 16 & 17 Vict. c. 9, s. 52; ib. s. 56.

[h] *Corpus humanum non recipit æstimationem.* It is said to be a *full execution*, but not a full and *perfect satisfaction*, Hob. 59.

The expression "the imprisonment is not absolute, but with a *quousque*" seems most consistent with the authorities, and with general principles, and not inconsistent with the above statute; for it is not framed on the admission that the death of the party operated as a satisfaction or extinguishment of the debt, but merely upon this, that doubts existed, and that it was time that such doubts should be removed by legislative enactment. In *Burnaby's ca.*,[a] where the question was, whether a commission in bankruptcy was valid, the debt being one upon which Burnaby had been charged, and was then in execution for, it was decided, that the body of the debtor being in execution, it was a satisfaction of the debt in point of law; so that the plaintiffs were not creditors who could petition; and the commission was superseded. All, however, this seems to determine, is, that the plaintiffs, who had made their *election* by arresting the debtor, could not be permitted, by the bankrupt laws, to proceed against his estate also. If the debtor be discharged, by *consent* of the execution creditor, the execution is satisfied, not only as against him; but if he be one of two joint contractors, the discharge, with such consent, will enure to the benefit of all.[b] Not so, however, if the discharge be by act and operation of law, as under the Insolvent Debtors' Act, or the like, that not being a discharge with the plaintiff's consent.[c] If judgments are obtained in separate actions against persons who are jointly liable for the same subject-matter, satisfaction of one judgment is, in effect, a satisfaction of both.[d] If a judge discharge a person in execution, when he ought not, he may by leave of the Court be retaken.[e] So if a man be charged in execution, and rescue himself and escape, the execution is not satisfied, it is execution without satisfaction.[f] So if the Sheriff *liberè et voluntariè* suffer a man to escape, it is execution without satisfaction.[g] So if a man be discharged because of a permanent or temporary privilege, it is no satisfaction.[h] So on a joint judgment against two, although one be taken in execution, the other may also. So the escape of the one does not discharge the other, for each is no more than a pledge.[i] In *Higgen's ca.*[k] it was held, that if the execution creditor take the bail in execution, although he had not full satisfaction, he shall not afterwards meddle with the principal; but this, perhaps, may be by the doctrine of *election*. On the other hand, if he take the body of the defendant in execution, he shall never have execution against the bail.[a] If there be judgment against A. and B., and A. be taken on a ca. sa., and a fi. fa. be executed against B., A. seems entitled to his discharge; because by executing the fi. fa. against B., the whole debt, or some part of it, is actually levied; and then A. cannot be in execution in order to satisfy the entire sum according to the writ, because he would be a pledge to satisfy that which is no debt at all, or, at least, in part no debt.[b] A debtor cannot agree with his creditor to be taken in execution a second time upon the same judgment.[c]

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[a] *Burnaby's case*, 1 St. r. 653; *Cohen v. Cunningham*, 8 T. R. 124.

[b] *Clark v. Clement*, 6 T. R. 526; *Tanner v. Hague*, 7 T. R. 420; *Blackburn v. Stupart*, 2 East, 243; *Heeles v. Fraser*, 7 Sc. N. C. 470; *Herring v. Dorell*, 8 Dowl. 604; *Ward v. Broomhead*, 7 Exch. 726.

[c] *Nadin v. Battie*, 5 East, 146; *Raynes v. Jones*, 9 M. & W. 105.

[d] *Turner v. Davis*, 2 Wms. Saund. 148; *Bailey v. Haynes*, 15 Q. B. 539.

[e] *Benyon v. Jones*, 15 M. & W. 570.

[f] *Mounson v. Cleyton*, Cro. Car. 240, 255.

[g] *Whiteacres v. Hamkinson*, Cro. Car. 75; *Alanson v. Butler*, 1 Lev. 211.

[h] *Barrack v. Newton*, 1 Q. B. 525; *Reynolds v. Newton*, 1 G. & D. 158; *Phillips v. Price*, 1 D. & L. 115; 1 Jac. 1, c. 13, s. 2.

[i] Gilb. 70, 72.

[k] Cro. Jac. 320; Gilb. 71.

Several writs.

When the Sheriff has several writs of ca. sa. in his office against the same individual, the same rule applies as to writs of *fieri facias*. "The Sheriff is authorized to arrest in all the actions in which he holds writs; it is not material which writ he chooses to enforce by warrant; he has an authority in every action, not arising out of any relation from one writ to another, but from the operation of the law, which empowers him in each of the causes to arrest or to detain if he has already arrested in any one. If, indeed, the Sheriff has acted collusively or improperly in the first arrest, so that an action would lie against him, the Court will hold that his subsequent act, grounded upon such an arrest, is void; but not so where the objection to the arrest arises from no misconduct of the Sheriff."[d]

Charging one in execution.

It is not necessary in any case to sue out a writ of *habeas corpus ad sat.* to charge in execution a person already in the prison of the Court; it is now done by a judge's order made upon affidavit that judgment has been signed, and is not satisfied. This order is served on the keeper, and has the effect of a detainer.[e] A man being in custody under process of contempt, may be charged in execution.[f] If issued under the 12 & 13 Vict. c. 106, s. 257, against a bankrupt during the suspension of his certificate of conformity, it cannot be enforced after such certificate has come into operation.[g]

When to be executed.

If issued in the lifetime of the judgment creditor, it may be executed after his death.[h] If unexecuted, it does not remain in force for more than one year from its teste unless renewed.[i]

Bound to know every man in his bailiwick.

The Sheriff is bound to know the person of every man in his bailiwick.[k]

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[a] Cro. Jac. 320; Gilb. 71.

[b] Gilb. 70.

[c] *Tanner* v. *Hague*, 7 T. R. 420; *Blackburn* v. *Stupart*, 2 East, 243; but a *cognovit*, founded upon a new writ, is valid; *Shawdy* v. *Colwell*, 8 Dowl. 375.

[d] *Barrack* v. *Newton*, 1 Q. B. 532; *Hooper* v. *Lane*, 10 ib. 546; *Reynolds* v. *Newton*, *suprà*; *Collins* v. *Yewens*, 10 Ad. & E. 572; *Barratt* v. *Price*, 9 Bing. 570; 1 Dowl. 725, S.C. *Samuel* v. *Buller*, 1 Exch. 439. As to the rule on a *fieri facias*, see *ante*, p. 179; but if taken on the only writ in the Sheriff's office, and that be bad, detainers lodged afterwards are also bad; *Barrack* v. *Newton*, 1 Q. B. 529. See also *Wright* v. *Stanford*, 1 Dowl. N. C. 272.

[e] 15 & 16 Vict. c. 76, s. 127.

[f] *Wade* v. *Wood*, 1 C. B. 462.

[g] *In re Everard*, 6 Exch. 111.

[h] *Ellis* v. *Griffith*, 16 M. & W. 106.

[i] 15 & 16 Vict. c. 76, s. 124.

[k] *Dean of Hereford* v. *Macnamara*, 5 D. & R. 97; *Dyke* v. *Duke*, 1 Arn. 14; 4 Bing. N. C. 197, S. C. *Ante*, p. 171.

**Arrest of privileged person.** **He is bound to arrest the first opportunity.** **Execution suspended.** **Misnomer.**

He *may* arrest a privileged person; and though he knows the fact, and makes the arrest maliciously, no action will lie against him.[a] If a bankrupt be arrested for debt, or on any escape warrant in coming to surrender, or shall, after his surrender, and while protected by order of the Court, be so arrested, he must, on producing such protection to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged.[b] He is bound to execute the process of the law in the most effectual way.[c] It is his duty to arrest the party the first opportunity; if not, he will be liable for any damage that may result from his negligence.[d] The true measure of damage, in such a case, is not necessarily the whole debt, but such a sum as the jury may, in each case, think equivalent to the real loss sustained; if, on *final* process, no actual loss be made out, the verdict must still be entered for *nominal* damages.[e] He must raise the *posse comitatus* if need be.[f] Should the plaintiff *or* his attorney command the Sheriff not to execute the writ, he cannot do so; for so far he is under the control of the party.[g] Disputes have arisen as to whether *John* can be arrested by the name of *William*. The difficulty is more seeming than real. *John*, for instance, is sued as *William*, and judgment is recovered against him, by the name of *William*. Now, as it is an axiom, that the writ of execution must accord with the judgment, it can only issue against him by the name of *William*, and the Sheriff must take him in that name. *John*, in short, is estopped by the record, from saying his name in not *William*.[h]

**Husband and wife.**

When judgment is obtained against husband and wife, and *both* are taken in execution, a judge may, and in general does, discharge her on affidavit that she has no separate property, or that there is collusion between the execution creditor and her husband; but, if she alone be taken on such a judgment, the courts are not agreed as to the power to discharge.[i] The Court of Q. B. has decided that the judge has a discretionary power in this case.[k] If the judgment be against the wife alone, of course she is not entitled to her discharge.

If the Sheriff be ordered to return *non est inventus*, and, in the meantime, the defendant surrender, he is bound to take him.[l]

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[a] *Magnay* v. *Burt*, 5 Q. B. 393; *Yearsley* v. *Heane*, 14 M. & W. 822; *Ewart* v. *Jones*, 3 D. & L. 264; and *ante*, p. 182.

[b] 12 & 13 Vict. c. 106, s. 113. See *Norton* v. *Walker*, 3 Exch. 488.

[c] *Beckford* v. *Montague*, 2 Esp. 475. See p. 171.

[d] *Ante*, p. 171.

[e] *Clifton* v. *Hooper*, 6 Q. B. 468: and see *Arden* v. *Goodacre*, 11 C. B. 371.

[f] *Ante*, p. 172.

[g] *Barker* v. *St. Quintin*, 1 D. & L. 542; *Howard* v. *Cauty*, 2 ib. 115; *Levi* v. *Abbott*, 4 Exch. 590; *ante*, p. 179.

[h] *Reeves* v. *Slater*, 7 B. & C. 486; *Fisher* v. *Magnay*, 6 Sc. N.R. 588: and see *Walley* v. *M'Connell*, 13 Q. B. 903.

[i] *Larkin* v. *Marshall*, 4 Exch. 804.

[k] *Edwards* v. *Martyn*, 21 L. J. Q. B. 87.

[l] *Magnay* v. *Monger*, 4 Q. B. 817.

Taking to gaol. When a person is taken on a ca. sa., he may be taken at once to gaol; the 32 Geo. 2, c. 28, applying only as to arrest on mesne process.[a]

Payment. It is no part of the Sheriff's duty, in executing this writ, to receive the money; but if he do receive it, *and* pay it over to the plaintiff, and the Sheriff, *after* such payment, liberate his prisoner, it is well; if he set him free *before* such payment, it will be an escape.[b]

Attorney's power to discharge. By *The Common Law Procedure Act*, 1852, a written order to discharge, under the hand of the attorney in the cause, by whom the writ was issued, is a justification to the Sheriff, unless the party, for whom such attorney professes to act, shall have given notice to the contrary; but such discharge is not to be a satisfaction of the debt, unless made by the authority of the creditor; and, lastly, it provides that nothing in the Act shall justify any attorney in giving such order to discharge without the consent of his client.[c]

The plaintiff, of course, can at all times direct his discharge; and any detention afterwards would be a trespass.

## RETURNS.

### *Non est inventus.*[d]

The within-named *C. D.* is not found in my bailiwick.

The answer of —— Sheriff.

### *Return of Cepi Corpus.*

I have taken the within-named *C. D.* whose body I have ready as within I am commanded.

The answer &c.

### *Cepi Corpus as to one Defendant and Non est inventus as to another.*

I have taken the within-named *C. D.* whose body I have ready as within I am commanded; but the within-named *E. F.* is not found in my bailiwick.

The answer &c.

### *Non est inventus of two.*

The within-named *A. B.* and *C. D.* are not nor is either of them found in my bailiwick.

The answer &c.

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[a] *Evans* v. *Atkins*, 4 T. R. 555.

[b] *Slackford* v. *Austen*, 14 East, 468; *Woods* v. *Finnis*, 7 Exch. 363. See p. 185.

[c] 15 & 16 Vict. c. 76, s. 126: see *Savory* v. *Chapman*, 11 A. & E. 829; *Connop* v. *Challis*, 2 Exch. 484.

[d] When the writ is indorsed with a direction to be returned *non est inventus*, the meaning is, that the Sheriff is not to search for the debtor; but if the debtor surrenders himself the Sheriff must detain him; *Magnay* v. *Monger*, 4 Q. B. 817. When the writ is lodged at the Sheriff's office merely to give the bail notice, this is a good return, though the plaintiff knew where to find the defendant; but if the defendant be already in custody of the Sheriff he cannot return *non est inventus*, see 2 Wms. Saund. 71 *e*.

### *Non est inventus of several.*

The within-named *A. B.* and the rest of the within-named defendants are not found in my bailiwick.
The answer &c.

### *Non est inventus of one and Mandavi Ballivo of another.*

The within-named *R. S.* is not found in my bailiwick; and as regards the taking of the within-named *I. F.* I have commanded *W. W.* bailiff of the liberty of —— who &c.
The answer of ——.

### *Withdrawal or Suspension of Writ.*[a]

I do hereby certify and return that after the coming of this writ to me directed that is to say on the —— day of —— A. D. 18— I was commanded by the within-named *A. B.* [*or* "by one *E. F.* the attorney of the within-named *A. B.*"] to forbear [*or* "suspend"] the execution thereof and have forborne [*or* "suspended"] accordingly.
The answers &c.

### *Cepi Corpus and Discharge out of Custody.*

I have taken the within-named *C. D.* and committed him to the common gaol of our lady the Queen of her castle of *C.* there to be kept in safe custody so that I might have his body before our lady the Queen ["before the justices of our lady the Queen" *or* "barons of her Exchequer"] at Westminster as within I am commanded; and I do hereby further certify and return that afterwards that is to say on the —— day of —— A. D. 18— by command of a certain other writ of our lady the Queen to me directed and delivered a transcript whereof is annexed to this writ [*or* "by the directions and command of the within-named *A. B.*" *or* "of one *E. F.* the attorney of the within-named *A. B.*"] I caused the said *A. B.* to be delivered from that prison and therefore the body of the said *C. D.* before &c. at the day and place within contained I cannot have as within I am commanded. The answer &c.

### *That the Defendant had become Bankrupt and obtained his Certificate, wherefore the Sheriff forbore to take him.*[a]

I do hereby certify and return that before the coming of the annexed writ to me directed the said *C. D.* in the said writ named then being a trader within the meaning of the laws relating to bankrupts and being then indebted to *E. F.* a subject of this realm in the sum of £50 and upwards and being also then indebted to divers other subjects of this realm in divers other large sums of money became and was a bankrupt and was thereupon duly found and adjudicated to be a bankrupt. And I do hereby further certify and return that such proceedings were thereupon had that the said *C. D.* afterwards and after the recovery of the sum and interest in the said writ mentioned and before the coming of the said writ to me directed to wit on the —— day of —— in the year of our Lord 18— duly obtained his certificate of conformity and which certificate afterwards and before the coming of the said writ to me directed was duly allowed according to the form of the statute in such case made and provided. And I do hereby further certify and return that the cause of action upon which the recovery in the said writ mentioned was had and obtained accrued to *A. B.* in the said writ named against the said *C. D.* before such time as the said *C. D.* so became a bankrupt. Wherefore I the said Sheriff having notice of all and singular the premises aforesaid did forbear to take the body of the said *C. D.* as within I am commanded.
The answer &c.

### *Privileged Person.*[a]

Before and at the time of the coming of this writ to me directed the within-named *C. D.* was and still is a peer of the realm having privilege of parliament ["a menial servant of her majesty the Queen" *or the like*] wherefore the body of the said *C. D.* before our lady the Queen on the day and at the place within contained I cannot have as within I am commanded. The answer of ——.

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[a] See *ante*, p. 205.

## SECTION VII.

### CAPIAS UTLAGATUM.[a]

What.

THIS is a writ of execution founded upon a judgment of outlawry, or of waiver, pronounced by the coroner in the County Court, or by the Recorder of London in the Court of Hustings.[b] By the common law, in all actions of trespass *quare vi et armis*, and in which there was a fine to the Crown, the process was a *capias;* and in such cases, process of outlawry lay by the common law. But in account, debt, covenant, and the like, the process was by summons and distress infinite, and not by capias.[c] In such cases, the capias and outlawry were introduced by Act of Parliament.[d]

How executed.

The writ is either general, or special; that is to say, against the *person* simply, or against *the person* and *goods*, or *lands and tenements of the* defendant. The mode of executing this writ is the same as that of other writs, with this distinction, however, that the Sheriff may break open the house of the person outlawed.[e] 1st. *As to the body of the debtor:* Privilege from arrest has been already considered.[f] At common law the defendant could not have been *bailed* when taken on a *ca. utl.*;[g] neither can he be bailed since 4 & 5 W. & M. c. 18, in *criminal* cases; at least, in misdemeanors, after conviction; nor when taken upon an outlawry *after* judgment.[h] In these cases, therefore, he must be kept *in arctâ custodiâ*. 2ndly. *With respect to his goods, chattels, lands, and tenements:* the Sheriff is to inquire, by the oath of honest and lawful men of his county, what he hath or had on the day of his outlawry, or at any time afterwards; and, by their oath, to extend and appraise the same according to the true value, and to take them into the Q.'s hands and safely keep them. It is a power to take and appraise, but not to *sell*.[i] He is to impanel a jury, who are to make inquiry of the goods and chattels of the defendant, including his debts,[k] and also of his *lands and tenements.* He is to appraise the goods, and to extend or value his lands and tenements.[l] Witnesses may be subpœnaed to attend the execution of the inquiry; when done, the Sheriff takes possession of the goods and chattels.[a] He must not oust nor disturb the possession of any tenant;[b] he can only take the issues or profits of the freehold tenements.[c]

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[a] As to outlawry, see p. 41.

[b] In *Harvey* v. *O'Meara*, 7 Dowl. 725, it was said that the judgment was but *interlocutory*, and the capias utlagatum but *mesne process* within the meaning of the 1 & 2 Vict. c. 110, s. 7. See *ante*, p. 41.

[c] 10 Co. 72; 2 Roll. Abr. 805; Co. Litt. 128 b.

[d] See Gilb. 73.

[e] Dalt. 524; Gilb. 76.

[f] *Ante*, p. 130: and see *Cassidy* v. *Steuart*, 9 Dowl. 366; *Ex parte Helsby*, 1 Deac. & C. 16; *Anon.* 15 L. J. Q. B. 268.

[g] 3 Burr. 1484; 4 ib. 2540.

[h] Ibid. Outlawry on mesne process is abolished, 15 & 16 Vict. c. 76, s. 24.

[i] Gilb. 75.

[k] Lane, 23; Lutw. 329, 1518: see *Bullock* v. *Dodds*, 2 B. & A. 276.

[l] The full legal import of the words *lands and tenements* has been already considered, *ante*, p. 173. This, however, should be kept in mind, that an *elegit* is more comprehensive than a special ca.

### *General Capias Utlagatum.*[d]

Victoria &c. We command you that you omit not by reason of any liberty in your bailiwick but that you enter the same and take *C. D.* being outlawed in your said bailiwick [*or* "in the county of ——"] on the —— day of —— last past at the suit of *A. B.* in an action on *contract* [*if the writ issue into a county different from that in which defendant was outlawed say* "as our Sheriff of —— returned to us (*or* 'to our justices' *or* 'to the barons of our Exch.') at W. at a certain day now past"] if he shall be found in your bailiwick and him safely keep so that you may have his body before us [&c.] at W. on the —— day of —— A. D. —— to do and receive what our Court before us [*or* &c.] shall consider of him in this behalf; and have there this writ. Witness &c.

### *Special Capias Utlagatum.*

Victoria &c. We command you that you omit not by reason of any liberty in your bailiwick but by the oath of good and lawful men of your said bailiwick you diligently inquire what goods and chattels lands and tenements *C. D.* late of —— hath or had in your bailiwick on the —— day of —— last past or at any time afterwards on which day he was outlawed in your county [*or* "in the county of ——"] at the suit of *A. B.* in an action of —— as you have lately returned to us [&c. *if the writ issue into a county other than from that in which defendant was outlawed say* "as our Sheriff of —— returned to us [&c.] at W. at a certain day now past"] and by their oath cause the same to be extended and appraised according to the true value thereof and what you find by that inquisition take into our hands and cause to be safely kept so that you answer to us for the true value and issues thereof; and having so extended and appraised the same what you shall have done thereupon make known to us [&c.] at W. on the —— day of —— 18— distinctly and plainly under your seal and the seals of those by whose oath you shall have made that extent and appraisement: And for that the said *C. D.* so being outlawed conceals himself and runs up and down in your county in contempt of us and in prejudice of our crown as we are informed we command you that you take the said *C. D.* wheresoever he shall happen to be found in your bailiwick as well within liberties as without and keep him safely so that you may have his body before us [&c.] at W. at the aforesaid time to do and receive what our said [&c.] shall consider of him in this behalf; and have there this writ. Witness &c.

### *Sheriff's Warrant on General Capias Utlagatum.*

W. to wit. } —— Esq. Sheriff of the county aforesaid to —— and —— my bailiffs greeting: By virtue of H. M.'s writ of *ca. utlagatum* to me directed and delivered I do hereby command you and each of you jointly and severally that you take *C. D.* wheresoever he may be found in my bailiwick and him safely keep so that I may have his body before our Lady the Q. [*in C. B.* "before the justices of our Lady the Q." *in Exch.* "before the barons of H. M.'s Exch."] at W. on the —— day of —— A. D. 18— as in the said writ I am commanded; and in what

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utl., for copyhold and customary lands may, by 1 & 2 Vict. c. 110, be taken under the former, but not under the latter, Parker, 190. Nor can *trust* property seemingly be taken, Cro. Jac. 513; Sty. 41. The Statute of Frauds, 29 Car. 2, c. 3, s. 10, and 1 & 2 Vict. c. 110, would seem not to apply to such a case.

[a] 9 Hen. 6, 20, 21; Gilb. 75.

[b] Ibid.; 21 Hen. 7, 7.

[c] Ibid.; Plowd. 541; Hardr. 106, 176; Bunb. 103, 105.

[d] *Ante*, p. 43.

manner you shall have executed this warrant certify to me immediately after the execution thereof. Given under the seal of my office this —— day of —— A. D. 18—.

—— Sheriff.

### *Charge to the Jury.*

Your charge is to inquire what goods and chattels lands and tenements *C. D.* of —— hath or had in my bailiwick on the —— day of ——[a] last past or at any time afterwards and also to inquire and say what is the true value thereof.

### *Oath.*

You shall well and truly try what goods and chattels lands and tenements *C. D.* of —— hath or had in my bailiwick on the —— day of —— last past or at any time afterwards and the value thereof and a true verdict give according to the evidence.

So help you God.

## RETURNS.[b]

### *Non est inventus.*

The within-named *C. D.* is not found in my bailiwick.

The answer of —— Sheriff.

### *To Special Ca. Utl.*

The execution of this writ appears in a certain schedule hereunto annexed.

### *Inquisition.*[c]

W. to wit. } An inquisition indented taken at *A.* in the county of *W.* the —— day of —— A. D. 18— before me —— Sheriff of the county aforesaid by virtue of the writ of our Lady the Q. to me directed and to this inquisition annexed by the oath of *A. B., C. D., E. F.* &c. [*as ante*, p. 200] which said goods and chattels I the said Sheriff have seized and taken into her Majesty's hands and have safely kept as within I am commanded: And the jurors aforesaid upon their oath aforesaid further say that the said *C. D.* was on [&c.] seised in his demesne as of fee [*as in* p. 200]; which said lands and tenements I the said Sheriff on the aforesaid day of taking this inquisition have taken into her said Majesty's hands and caused to be safely kept as within I am commanded: And lastly the jurors aforesaid upon their oath aforesaid further say that the said *C. D.* hath not nor had he on the —— day of —— or at any time afterwards any other or more goods and chattels lands or tenements in my bailiwick which I can take into my hands as within I am commanded. In witness &c.

When the special writ is returned, the writ and inquisition are filed with the clerk of the exigents and outlawries, and afterwards carried to the office of the *Custos Brevium*, from whence a transcript is sent into the Exch.;[d] and then from the Court of Exch. issue a *venditioni exponas* to sell the goods, a *levari facias* to levy the issues and profits of the freehold land, or sequestration as the case may be, and a *sci. fa.* to recover the debts.[e] The money raised by these writs belongs to the Crown; but the plaintiff may have it paid to him in satisfaction of his debt and costs, by applying to the Court of Exch. or Lords of the Treasury; if it does not exceed *50l.*, by motion to the Court; if it exceed that sum, the plaintiff must petition[a] the Lords of the Treasury. An order is then made under warrant to the Attorney-General, and with a subpœna annexed is delivered to the Sheriff, which he must obey under the penalty of an attachment.[b]

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[a] The day the judgment of outlawry was pronounced.

[b] See the returns to *fi. fa.*, *ante*, p. 185; *ca. sa.*, *ante*, p. 206; *eligit*, *ante*, p. 199: and see *ante*, p. 44; Dalt. ch. 54.

[c] *Ante*, p. 44; as to the certainty of this, see *ante*, p. 200; *Engler* v. *Annesley*, 1 Dowl. N. S. 186; 2 Salk. 469; Bunb. 108.

[d] *Reynolds* v. *Adams*, 3 T. R. 578. In *Wilkinson* v. *Rocklas*, 1 Mod. Rep. 90, Hale says, "It is the course of the Exch. in case of an outlawry to prefer an *information* in the nature of trover and conversion against him that hath the goods of the party outlawed."

[e] See *R.* v. *Hind*, 1 Dowl. 286; *R.* v. *Armstrong*, 3 ib. 760; *Grant* v. *Bryant*, 6 M. & S. 347; *Alworth* v. *Hutchinson*, 1 Lutw. 384; Gilb. C. P. 16.

## SECTION VIII.

### RETORNO HABENDO.

THIS is a writ for *defendant* in replevin to get a return of the chattels replevied.[c]

### *Retorno habendo after Nonsuit on a Distress for Rent.*

Victoria &c. To the Sheriff of —— greeting. Whereas *C. D.* was summoned to be in our Court before us [*or* "before our justices"] at W. to answer *A. B.* of a plea wherefore the said *C. D.* on &c. [*as in declaration*]; and the said *C. D.* appearing in our said Court before &c. as bailiff of —— well acknowledged the taking of the said goods and chattels in the declaration mentioned in the said place in which &c. and justly &c. for certain arrears of rent to wit for the sum of £ —— due and in arrear from the said *A. B.* to the said —— for the said place in which &c. with the appurtenances (amongst other things) held and enjoyed under and by virtue of a certain demise thereof made by the said —— for the space of —— next before and ending on the —— day of —— A.D. 18—. And afterwards to wit at the assizes holden in and for your said county on the —— day of —— A.D. 18 — before certain justices assigned to take the assizes in and for the same county a certain issue before then joined between the parties aforesaid in the plea aforesaid came on to be tried by a certain jury of the country upon which as well the said *A. B.* as the said *C. D.* had put themselves in that behalf. And the jurors of that jury being ballotted approved and sworn to try the said issue withdrew from the bar to consult of their verdict thereupon and having consulted and agreed among them to give in their verdict they came back again to the bar whereupon the said *A. B.* (although solemnly called) came not nor further prosecuted his suit against the said *C. D.*; and thereupon it was afterwards considered in our said Court before us [*or* &c.] that the said *A. B.* should take nothing by his writ aforesaid &c. [*reciting the judgment for a return*]. Therefore we command you that without delay you cause the said goods and chattels to be returned to the said *C. D.* to hold to him irreplevisable in form aforesaid and in what manner you shall have executed this our writ make appear to us [*or* &c.] on &c. wheresoever &c. and have there this writ.

Witness &c.

### *Retorno habendo after Verdict on a Distress for Rent.*

Victoria &c. To &c.: Whereas *C. D.* was summoned to be in our Court &c. [*as above*]; and the said *C. D.* appearing in our said Court before &c. by —— his attorney well avowed &c. [*reciting avowry*]. And the said *A. B.* in and by certain pleas in bar of the said avowry said that he the said *A. B.* did not hold or enjoy the said dwelling house in which &c. (amongst other things) as tenant thereof to the said *C. D.*

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[a] Tidd's Pr. Forms, 54.

[b] 2 Chitt. Archb. 1142; as to poundage, see *Graham* v. *Grill*, 2 M. & S. 294.

[c] *Mounson* v. *Redshaw*, 1 Wms. Saund. 195. We often find the *ret. hab.* and a *fi. fa.* together in the same writ. Mr. Tidd adopts it.

by virtue of the said demise thereof and at and under the rent in the said avowry mentioned payable as therein also mentioned and that no part of the said rent was due and owing from the said *A. B.* to the said *C. D.* in manner and form as the said *C. D.* had above in his said avowry in that behalf alleged; and afterwards by a certain jury of the country upon which as well the said *C. D.* as the said *A. B.* had put themselves in that behalf taken on the —— day of —— A.D. 18— at —— in your county before —— justices assigned to hold the assizes in and for your said county according to the form of the statute in that case made and provided it was found that the said *A. B.* did hold and enjoy the said dwelling-house in which &c. (amongst other things) as tenant thereof to the said *C. D.* by virtue of the said demise thereof at and under the rent payable as alleged in the said avowry and that the said rent was due and in arrear from the said *A. B.* to the said *C. D.* as the said *C. D.* had in his said avowry in that behalf alleged whereupon it was afterwards considered in our said Court before &c. that the said *A. B.* should take nothing by his writ aforesaid &c. [*reciting the judgment*]. Therefore we command you that without delay you cause the cattle goods and chattels aforesaid to be returned to the said *C. D.* to hold to him irreplevisable in form aforesaid and in what manner you shall execute this our writ make appear to us on —— wheresoever &c.

Witness &c.

## *Retorno habendo after Verdict on a Distress Damage Feasant.*

Victoria &c. To &c.: Whereas *C. D.* was summoned to be in our Court &c. [*as before*] to answer *A. B.* of a plea wherefore &c. [*as before*] and the said *C. D.* appearing in our said Court before &c. alleged and said that he as bailiff of —— took the goods and chattels aforesaid in the said place in which &c. being the soil and freehold of the said —— doing damage there and the said *C. D.* prayed a return of the said goods and chattels to be adjudged to him, &c.; and afterwards by a certain jury of the country upon which as well the said *C. D.* as the said *A. B.* had put themselves in that behalf taken on &c. at &c. in your county before —— it was found that the said place in which &c. at the said time when &c. was the soil and freehold of the said —— as the said *C. D.* had alleged. Whereupon it was afterwards considered in our said Court before —— that the said *A. B.* should take nothing by his writ aforesaid &c. [*reciting the judgment*]. Therefore we command you that without delay you cause the goods and chattels aforesaid to be returned to the said *C. D.* to hold to him &c. [*as before*].

Witness &c.

## *Warrant to Bailiff to execute Retorno habendo.*

*C.* } *J. F.* Esq. Sheriff of the county aforesaid to —— and —— my bailiffs
to wit. } greeting: By virtue of her Majesty's writ of *retorno habendo* to me directed and delivered I do hereby command you and each of you jointly and severally that without delay you cause the cattle goods and chattels of the within-named —— which —— took and unjustly detained as it is said to be returned to the said —— to hold to him irreplevisable [*if a fi. fa. be added say* "I do hereby also command you and each of you jointly and severally that of the goods and chattels &c."].

## RETURNS.

### *Elongata.*[a]

Before the coming of this writ to me the cattle goods and chattels within-mentioned were eloigned and removed by the within-named *A. B.* to places to me unknown therefore I cannot cause the same to be returned to the within-named *C. D.* as I am within commanded.

The answer of —— Sheriff.

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[a] *Ante*, p. 39; he cannot return that there are no such cattle or goods found in his bailiwick; he ought in such case to return *quod averia sunt elongata;* Dalt. 276, 174. He must say, "to places unknown"—"to places unknown *within his county*" would be bad, ib. 277. It is a good return that the cattle are dead, ib. He must raise the *posse comitatus*, and therefore a *rescous* is a

### *A Return of Goods, &c.*

By virtue of this writ to me directed I have caused to be delivered to the within-named —— the cattle goods and chattels within-mentioned as within I am commanded to do.

The answer of ——.

## SECTION IX.

### HABERE FACIAS POSSESSIONEM.[a]

Judgment in ejectment.

IN ejectment, the judgment for the claimant is that he "do recover possession of the land in the said writ mentioned, with the appurtenances," or "of the said part of the said land," (as the case may be,) "and £— for costs."[b] In ejectment by a landlord against his tenant for non-payment of rent, the jury may give damages for mesne profits down to the verdict, or to a day specified therein. The judgment then will be for the possession of the land, damages, and costs.[c] Upon a confession of one of several defendants, the claimant may sign judgment for *costs*.[d] The judgment for the defendant is that he be acquitted, and that he recover against the claimant £— for his costs of defence.[e]

One or separate writs.

When execution may issue.

Proceedings need not be entered on roll.

Upon any judgment in ejectment for recovery of possession and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs, at the election of the claimant.[f] Upon a finding for the claimant, judgment may be signed, and execution issue for the recovery of possession and costs, within such time, not exceeding the fifth day in term after the verdict, as the Court or Judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen.[g] The time is the same when the judgment is for the defendant and for costs.[g] For the purposes of execution, it is not necessary to enter the proceedings upon any roll; an *incipitur* is sufficient.[h]

### *Indorsement of Writ.*[i]

Levy £—— and poundage.[k]

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bad return. He may return that no one on the part of the plaintiff came to point out the cattle, ib. 277, 556; *ante*, p. 171 n. But as a replevin bond is given and proceedings either taken upon it or against the Sheriff for taking insufficient pledges, it would be useless to encumber a practical work with precedents of little or no use.

[a] For *form of writ*, see Reg. Gen. Hil. T. 1853; Sch. (A) Nos. 23, 24; as to direction, teste, &c., see ib. r. 70, &c.; 15 & 16 Vict. c. 76, s. 120, &c.

[b] 15 & 16 Vict. c. 76, ss. 177, 185; Sch. (A) Nos. 14, 15, 20; Reg. Gen. H. T. 1853, r. 112, 114.

[c] Ib. s. 214; *Smith* v. *Tett*, 9 Exch. 307.

[d] Ib. s. 203; Sch. (A) No. 20.

[e] Ib. s. 186; Sch. (A) No. 18.

[f] Ib. s. 187.

[g] Ib. ss. 185, 186; *ante*, p. 165.

[h] Ib. s. 206; Reg. Gen. H. T. 1853, r. 70.

[i] Ib. ss. 128, 169; Reg. Gen. H. T. 1853, r. 73, 76; *post*, p. 216.

[k] *Post*, p. 216.

The writs of fi. fa., ca. sa., and elegit, when separate writs, are, in all respects, the same as in other cases.

*Warrant.*

W—— } —— Sheriff of the county of *W.* aforesaid to *T. D.* and *R. B.* my
to wit. } bailiffs greeting: By virtue of the writ of *hab. fac. poss.* to me directed and delivered I do hereby command you and each of you jointly and severally to cause the said *J. D.* to have the possession of the said land in the said writ specified with the appurtenances ["and I do further command you or one of you," as in warrant in *fi. fa. ca. sa.* &c. if the writs be united]: And forthwith certify the same to me. Given under the seal of my office this —— day of —— A.D. 18—.

—— Sheriff.

Land must be pointed out.

The Sheriff is not bound *ex officio* to know nor to seek the land; the plaintiff, or some one on his behalf, must, therefore, go and point it out; if not, the Sheriff not only may, but ought to return the fact, that no one came on the part of the plaintiff to show the premises to him.[a] It is not unusual to call upon the plaintiff for an indemnity,[b] before the execution of the writ; if refused, the Sheriff must act upon the above rule, viz. deliver possession of what is shown to him by the plaintiff, or by some one on his behalf; if the indemnity be given, to deliver what he requires.[c] If a stranger's land be shown to him, by force whereof he enter, he is no trespasser.[d]

When to be executed.

He must execute the writ in a reasonable time.[e]

Posse comitatus.

He must (if need be) raise the *posse comitatus;* a return, therefore, that he could not deliver possession, by reason of resistance, is a bad return.[d]

Breaking doors.

Doors may be broken open, by the officer, after signifying the cause of his coming, and making request that they may be opened; for otherwise the writ could not be executed.[f]

How possession given.

When land is recovered, the Sheriff puts the claimant into possession by a twig, bough, clod, or the like. When a house is recovered, possession is delivered by the ring of the door; or, when the door is open, by parol, as by bidding him enter and take possession, &c. If common appendant or appurtenant be recovered, he gives possession of the *land*, to which it is appendant or appurtenant, and possession of the common follows. If a highway be recovered, he delivers possession of the *land*, subject to the public easement, or right of way. If a fishery, he delivers possession of the land, covered with water. If a mine, he enters it, and by a piece of ore, or stone, or the like, delivers possession of it. If an alder cave, by a twig, or the like. If a cattle-gate, by a clod, or the like. In short, that which the Sheriff takes, as a symbol of possession, ought, in strictness, in each case, to be part and parcel of the thing itself. It is, in law, *pars pro toto.* If the claimant recover (say) 100 out of a plot of ground of 200 acres, the Sheriff delivers one or more, in the name of the whole, without dividing it by metes and bounds.[g] If a certain number of acres are to be delivered, he must deliver possession of that number of acres, according to the estimation in the county where the lands lie.[a] If several tenements, mentioned in the writ, be in the possession of several tenants, the officer must give possession of each separately; of one, in the name of all, is not sufficient. But if all be in the possession of the same tenant, it is said to be sufficient to deliver possession of one in the name of all.[b] The safest way is to remove the tenant of each house, and to deliver possession separately. As the end of the writ is to give the party full and actual possession, he must remove all persons, and their goods, from off the premises, otherwise the execution is not complete.[c] The execution is not complete, until the bailiffs are withdrawn, and possession completely given.[d] If a stranger turn the plaintiff out of possession, after execution fully executed, the plaintiff is put to his new action, or to an indictment for the forcible entry; if the same defendant disturb him, he cannot have another writ of *hab. fac.* whether the Sheriff have returned the former or not.[e] When a Sheriff's officer, acting under an hab. fac. is dispossessed before he deliver possession, it must appear, that the persons dispossessing are acting in concert with the defendant, before a fresh writ can issue.[f] If the Sheriff deliver possession of more than he ought, the Court will, on a summary application, order it to be restored.[g] Where crops were standing on the land, when possession was delivered, the Court refused to compel the lessor of the plaintiff to pay over to the late tenant (defendant) the value of the crops, after deducting the rent.[h]

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[a] Dalt. ch. 63; *ante*, p. 171, n; see form, *post*, p. 217.

[b] See form, *post*, p. 216.

[c] Run. Eject. 484; *Connor* v. *West*, 5 Burr. 2672.

[d] Dalt. ch. 63.

[e] *Mason* v. *Paynter*, 1 Q. B. 974.

[f] Dalt. 256, 257; Gilb. 19; Run. Eject. 485.

[g] Vin. Abr. Exec. (H.); Palm. 289; Run. Eject. 486.

When execution is complete.

Excessive delivery how remedied.

Crops.

To save the expense of executing a writ of possession, tenants in possession may attorn to the plaintiff.

Attornment.

### *Attornment.*

In the Q. B.

*A. B.*
v.
*C. D.*

MEMORANDUM that we being the tenants of the premises for which this action is brought and whose names are hereunder written do hereby this —— day of —— A.D. 18— respectively attorn and become tenants thereof unto the above-named *A.B.* and do severally hold of him the several messuages &c. with their appurtenances opposite our respective names more particularly mentioned and described and on account of and in part payment of rent for the same do and each of us doth give to the said *A. B.* 1*s.* as witness our hands this —— day of —— A.D. 18—.

Witness *C. D.*
*O. B.* *E. F.*

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[a] *Floyd* v. *Bethill,* 1 Roll. Rep. 420; 1 Roll. Abr. 886.

[b] Ibid.; Run. Eject. 485.

[c] Lutw. 1486; *Upton* v. *Wells,* 1 Leon. 145; Tidd's Pr. 1081, 8th edit.; Palm. 289.

[d] 6 Mod. 115; Leon. 145; Palm. 289; *Doe* d. *Pitcher* v. *Roe.* 9 Dowl. 971.

[e] *Doe* d. *Pate* v. *Roe,* 1 Taunt. 55: see *Doe* d. *Lloyd* v. *Roe,* 1 Dowl. N. S. 407.

[f] *Doe* d. *Thompson* v. *Mirehouse,* 2 Dowl. 200; *Doe* d. *Lloyd* v. *Roe, suprà.*

[g] *Roe* v. *Dawson,* 3 Wils. 49; Run. Eject. 485.

[h] *Doe* d. *Upton* v. *Witherwick,* 3 Bing. 11; S. C. 10 Moore, 267.

SCHEDULE.

| Plan. | Names of Fields. | Use. | Admeasurement. | Situation. | Tenant. |
|---|---|---|---|---|---|
| No. | | | A. R. P. | | |
| 1 | Top Closes ......... | Pasture... | 10 3 12 | Parish of M... | *C. D.* |
| 2 | High Moor ......... | Arable ... | 40 0 0 | ...... | *E. F.* |

Amount to be levied.

The amount to be levied may be gathered from the following precedent:—

| | £ | s. | d. |
|---|---|---|---|
| Poundage on 100*l.*[a] | 5 | 0 | 0 |
| For warrant | 0 | 2 | 6 |
| To bailiff for executing warrant | 1 | 1 | 0 |
| For man in possession (*not boarded*) | 0 | 15 | 0 |
| Sale by auction (say) | 0 | 5 | 0 |
| Hab. fa. and fi. fa., or ca. sa. | 0 | 18 | 0[b] |
| | 8 | 1 | 6 |

## *Bond of Indemnity.*[c]

Know all men by these presents that we *G. A.* of —— *G. P.* of —— and *C. W.* of —— in the county of *W.* are held and firmly bound to Sir *G. M.* Bart. of —— High Sheriff of the said county in the sum of £ —— to be paid to the said Sir *G. M.* Bart. or to his certain attorney executors administrators or assigns for which payment to be well and truly made we bind ourselves and each of us our and each of our heirs executors and administrators and every of them jointly and severally firmly by these presents sealed with our seals and dated this &c.

Whereas on the —— day of —— A.D. 18— a writ of hab. fac. poss. was delivered to the said Sir *G. M.* Bart. at the suit of the above-named *G. A.*; and whereas also the above-named *G. A.* hath applied to and requested the said High Sheriff to deliver to him under the said writ certain tenements in his bailiwick that is to say —— which he hath consented to do upon being indemnified for so doing.

Now the condition of the above written obligation is such that if the above bounden *G. A.*, *G. P.* and *C. W.* or any of them their or any of their heirs executors or administrators do and shall from time to time and at all times hereafter well and sufficiently indemnify the said Sir *G. M.* Bart. from all costs and expenses to be incurred or to which he may become liable by reason of the premises then that the above written obligation to be void otherwise to stand and remain in full force vigour and effect.

*G. A.* (L.S.)
*G. P.* (L.S.)
*C. W.* (L.S.)

Signed sealed and delivered in the presence of me } ——.

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[a] 8 Geo. 1, c. 15, s. 16; *Nash* v. *Allen*, 1 Dav. & Mer. 20; 4 Q. B. 784, S. C.; 15 & 16 Vict. c. 76, s. 123.

[b] Reg. Gen. Hil. T. 1853 (*Costs*).

[c] See *ante*, p. 214.

### RETURNS.[a]

### *Possession given.*

By virtue of this writ to me directed on the —— day of —— in the year within written I caused the within-named *A. B.* to have possession of —— with the appurtenances as within I am commanded. *Also* I have caused to be levied of the goods and chattels of the said *C. D.* the sum of £—— which money I have ready as within I am commanded.

The answer of ——.

### *Nulla Bona.*

*Or,* And the within-named *C. D.* hath not any goods or chattels in my bailiwick whereof I can cause to be made the sum of £—— within mentioned or any part thereof.

The answer of ——.

### *Nullus venit.*

By virtue of this writ to me directed I have been always ready and willing to deliver the possession of the premises within mentioned to the within-named *A. B.* with the appurtenances as I am within commanded; but no one came to me on the part of the said *A. B.* to show the same premises to me or any part thereof or to receive the possession thereof or any part thereof from me.

The answer of ——.

### *Offer and Refusal.*[b]

By virtue of this writ to me directed I have been always ready and willing to deliver possession of the premises within mentioned to the within-named *A. B.* with the appurtenances as within I am commanded and did on the —— day of —— in the year within written offer to deliver them to him but he refused to receive the same.

The answer of ——.

## SECTION X.

## EXTENT.

What.

AN *extent* (in the sense in which it is here used) is a prerogative execution. It is a common-law execution, modified and restricted by the 33 Hen. 8, c. 39.[c] A statute merchant, statute staple, and recognizances in nature of a statute staple, are now wholly disused; but bonds, relating to the public revenue, are, in effect, the same as a statute staple.[d] The body, lands, and goods, of a debtor or accountant to the king, were liable at common law. But, by the 33 Hen. 8, c. 39, a new right seems to have been given to the Crown, viz. the right of taking all *at once* in execution.[e] The Crown debts are, either of record, or not of record. There can

Crown debts.

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[a] See Roll. Abr. Return (I.); Dalt. ch. 68; Ret. Br. 46, 352. The returns to the fi. fa. and ca. sa. are as in other cases.

[b] Dyer, 278; Impey, 528; Dalt. 255.

[c] See *Giles* v. *Grover*, 9 Bing. 248.

[d] *Underhill* v. *Devereux*, 2 Wms. Saund. 70 *f*; 3 Bl. Comm. 420; Burton on Real Pr. s. 871; and *ante*, p. 164.

[e] *Giles* v. *Grover*, *suprà*.

be no debt of the Crown, upon which process can issue, except it be of record.[a] Such debts are recoverable by extent, *scire facias*, or, by filing an information on the record itself.[b]

Kinds of extents.

The writ of extent is of two kinds, viz. *in chief*, and *in aid*. An extent in chief is an adverse proceeding by the Crown against a Crown debtor, or against the debtor of a Crown debtor. An extent in aid is, when the extent is issued at the instance of a Crown debtor, against his debtor, *to aid* his payment of the Crown debt.[c] There are also extents of the *second* and *third* degree.[d] The term *immediate* extent means an extent which issues without a *scire facias*.[e] The writ is called an extent or *extendi facias*, because the Sheriff is to cause the lands, &c., to be appraised, to their full extended value, that it may be known how soon the debt will be satisfied.

Whence issued.

Teste, &c.

Affidavit of danger.

Amount to be levied.

What to be done with surplus.

The writ formerly issued out of the equity side of the Exchequer, upon the *fiat* of the Chancellor of the Exchequer, or that of a Baron, which was the commencement of the Queen's suit, or award of execution.[f] It is now issued by H. M.'s Remembrancer in the Court of Exchequer.[g] It may issue in term, or in vacation; is *tested* on the day it issues; is signed by the Queen's Remembrancer; sealed with the Exchequer seal; and made *returnable* on a day certain in term, or in vacation.[h] By a rule of the Court of Exch., dated 22nd June, 1822, "It is ordered that from henceforth no fiat for an extent *in aid* shall be granted, unless the party applying for the same, or some person or persons on his behalf, shall make *affidavit*, that unless the process of extent for the debt due to him from his debtor be forthwith issued, the debt due to the Crown, from the party applying, will be in danger of being lost to the Crown."[i] Upon the issuing of every extent *in aid*, the amount of debt due, or claimed to be due, to Her Majesty, must be stated and specified in the *fiat*, and if the debt found due to the Crown debtor equals or exceeds that amount, such amount is to be indorsed upon the writ as the sum to be levied by the Sheriff; and if the debt found due to the Crown debtor is of less amount than the sum specified in the *fiat*, the amount, so found due, is the sum to be indorsed, and levied. As to any overplus arising from the sale of lands, &c., it is provided, that such overplus shall be paid into the Court of Exchequer, together with the amount indorsed upon the writ; and the Court will, upon summary application, make such order for the return, disposal, or distribution of it, or any part of it, as may appear proper.[k] The intent of this branch of the statute was, to prevent in future the practice of issuing extents in aid, for recovering larger sums than were due to the Crown by the debtors on whose behalf such extents were issued. Sect. 4 prevents, in future, the issuing of extents in aid on the application of certain bond and simple contract debtors to the Crown; but there is a saving clause, as to simple contract debtors becoming so by the collection or receipt of any money arising from Her Majesty's revenue. Sect. 5 enacts, that no extent *in aid* shall issue on bonds as surety for insurance companies. And lastly, the Act provides for the discharge of persons imprisoned under the writ of capias in any extent in aid, upon giving the proper notice, and in other respects complying with the provisions of the statute.

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[a] *Reg.* v. *Ryle*, 9 M. & W. 227, 239.

[b] *Attorney-General* v. *Sewell*, 4 M. & W. 77.

[c] Extents *in aid* are regulated by 57 Geo. 3, c. 117; but it does not apply to an extent *in chief*, *Rex.* v. *Bell*, 11 Price, 772. When it may be resorted to, when not, see *R.* v. *Bingham*, 2 C. & J. 130; 2 Dowl. 129.

[d] *R.* v. *Shackle* 11 Price, 772; Gilb. Exch. 177; *Ewin's ca.* Parker, 259.

[e] West, 18; Gilb. Exch. 168.

[f] West, 58.

[g] 5 & 6 Vict. c. 86, s. 2.

[h] *Rex* v. *Maberley*, 2 Dowl. P. C. 383; *R.* v. *Renton*, 2 Ex. 216; 5 & 6 Vict. c. 86, s. 8; West, 56, 58.

[i] 2 Wms. Saund. 70 *e*, n. (*x*).

[k] 57 Geo. 3, c. 117, ss. 1, 2.

Extent in aid not to be sued out by simple contract and certain bond debtors.

In order to issue an extent, as already stated, the debt must be on the records of the Court. The mode of doing it is this:—an affidavit is made, stating two things—the debt, and the danger of its being lost, without some more speedy and efficacious process.[a] If no affidavit of danger can be made, the proceeding is by *scire facias*. A commission of inquiry first of all issues to find the debt. This is an *ex parte* proceeding—a mere form to put the debt upon record, in order to authorise the issuing of the process.[b] The inquisition is taken before a jury, but no *vivâ voce* evidence of the debt is required; the jury may find the fact of a debt being due to the Crown on the sole evidence of an *affidavit* that the debt is due; and this is the usual evidence.[c] No notice is given to the debtor of the execution of this commission; nor could he, it would seem, attend and dispute the claim. The proper time for doing so is when the extent issues, and the inquisition is taken before the Sheriff and the jury. When the debt is thus found of record, upon the same affidavit, and a baron's *fiat*, the extent issues. In one case it seems to have been issued on an inquisition and fiat of eight years' standing. Extents may issue into different counties at the same time; and before or after the return of the first, others may issue with the same teste as the first. The writ does not abate by the death of the debtor.[d]

Must be a debt of record.

Proceedings upon extent.

## *Affidavit for immediate Extent in Chief.*[e]

In the Exchequer.

*H. H.* of —— gentleman and captain of the *C. Y. C.* maketh oath and saith that *J. R.* of —— banker is justly and truly indebted to our sovereign lady the Queen in the sum of £ —— being so much of her majesty's monies deposited in his hands by —— for the service of the said regiment and unaccounted for by the said *J. R.* and that he verily believes that the said *J. R.* has stopped payment and is in embarrassed and insolvent circumstances and that unless some method more speedy than the ordinary course of proceeding at law be forthwith had against the said *J. R.* for the recovery of the debt so due and owing to her majesty as aforesaid the same is in danger of being and will be lost.

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[a] West, 51, and Appendix.

[b] See *R.* v. *Collingridge*, 3 Price, 280.

[c] *Reg.* v. *Ryle*, 9 M. & W. 227.

[d] West, 60; Price, 395.

[e] *Reg.* v. *Ryle*, 9 M. & W. 227; *R.* v. *Marsh*, 13 Price, 826.

Sworn &c. *H. H.*

### *Or,*

In the Exchequer.

*A. B.* of —— officer of excise and *C. D.* of —— clerk to *B. B.* attorney at law severally make oath and say: and first this deponent *A. B.* for himself saith that *E. F.* and *G. A.* of —— by their bond or writing obligatory sealed with their seals bearing date &c. became held and firmly bound &c. [*reciting bond and conditions*]; and this deponent further saith that on the —— day of —— A. D. 18— the said *E. F.* and *G. A.* had and received of and from this deponent the sum of £—— of the money of our said sovereign lady the Queen; and this deponent further saith that the said *E. F.* and *G. A.* or either of them have not well and truly paid or caused to be paid unto &c. [*as in bond*] but have wholly omitted and neglected so to do contrary to the condition of the said bond or writing obligatory; and this deponent further saith that the said sum of £—— is now wholly due and owing to her majesty by them the said *E. F.* and *G. A.*; and this deponent *C. D.* for himself saith that the said *E. F.* and *G. A.* are greatly decayed in their credit and circumstances and have stopped payment as this deponent hath been informed and verily believes [*or* "hath lately offered and are about to make an assignment of their estate and effects for the benefit of their creditors as this deponent hath been informed and verily believes"] and that a fiat in bankruptcy hath been issued against the said *E. F.* and *G. A.* for the purpose of their being adjudged and declared bankrupts; and this deponent *A. B.* further saith that he verily believes that unless some method more speedy than the ordinary course of proceeding at law be had against the said *E. F.* and *G. A.* for the recovery of the said money the same is in danger of being lost.

Sworn &c. *A. B.*
*C. D.*

### *Affidavit for Extent in Chief in the 2nd Degree.*

In the Exchequer.

*A. B.* of —— gentleman maketh oath and saith that on the —— day of —— last a writ of extent directed to the Sheriff of the county of *W.* was issued out of this honourable Court against *C. D.* of —— for the sum of £—— due to her majesty; and this deponent further saith that by an inquisition indented taken at —— it was found (amongst other things) by the said jury of the county of *W.* that on the —— day of —— and on the day of taking the said inquisition *T. S.* of —— was indebted to the said *C. D.* in the sum of £—— for &c. and which said debt of £—— due and owing from the said *T. S.* the said Sheriff of the county of *W.* then and there seized into her majesty's hands as by the said inquisition will more fully appear; and this deponent further saith that the said *T. S.* is greatly decayed in his credit and circumstances and &c. [*as before*].

### *Affidavit for Extent in Aid.*

*A. B.* of —— merchant maketh oath and saith that he this deponent by his bond or writing obligatory stands justly and truly indebted to our sovereign lady the Queen in the sum of £——; and this deponent further saith that *C. D.* of —— is justly and truly indebted to this deponent in the sum of £—— for &c.; and this deponent further saith that the said *C. D.* is greatly decayed in his credit and circumstances and hath informed this deponent that he was unable to pay the said debt; and this deponent further saith that the said debt is a debt originally and *bonâ fide* due and owing unto him without any manner of trust, and that the same hath not been sued for in any other Court; and that unless &c. [*as ante*, p. 219].

### *Fiat for Extent in Chief.*

Upon reading this *affidavit* and also a commission and inquisition taken thereon let a writ or writs of immediate extent issue against the within-named *E. F.* and *G. A.* for the recovery of the within-mentioned sum of £—— with the usual proviso. Dated the —— day of —— 18—.

F. POLLOCK.

### *Writ of Extent in Chief.*

Victoria &c. to the Sheriff of —— greeting: Whereas *E. F.* and *G. A.* of —— by their writing obligatory sealed with their seals bearing date the —— day of —— A.D. 18— became jointly and severally bound to us in the sum of £—— of good and lawful money of Great Britain payable at a day now past which said sum of money they have not nor hath either of them yet paid or caused to be paid to us as we are informed: And we being willing to be satisfied the same with all the speed we can as is just do command you that you omit not by reason of any liberty in your bailiwick but enter the same and take the said *E. F.* and *G. A.* by their bodies wherever they shall be found in your bailiwick and keep them safely and securely in prison till we shall be fully satisfied the said debt; and that as well by the oaths of good and lawful men of your bailiwick as by the oaths and testimony of any other good and lawful men by whom the truth may be the better known as by all other lawful means you diligently inquire what lands and tenements and of what yearly values the said *E. F.* and *G. A.* or either of them had in your bailiwick on the said —— day of —— A.D. 18— on which day they first became our debtors as aforesaid or at any time since; and what goods and chattels and of what sorts and prices and what debts credits specialties and sums of money the said *E. F.* and *G. A.* or either of them or any person or persons to their or either of their use or in trust for them or either of them now hath or have in your bailiwick; and that all and singular such goods and chattels lands and tenements debts credits specialties and sums of money in whose hands soever the same now are you diligently appraise and extend on the oaths of the said good and lawful men and do take and seize the same into our hands there to remain until we shall be fully satisfied the said debt according to the form of the statute made for the recovery of such our debts: And lest this our command should not be fully executed we further command and empower you by these presents to summon before you such persons as you shall think proper and carefully examine them in the premises and that you distinctly and openly make appear to the barons of our Exchequer at W. on the —— day of —— next in what manner you shall have executed this our command and that you then have there this writ: Provided that what goods and chattels you shall seize into our hands by virtue hereof you do not sell or cause to be sold until we shall otherwise command you. Witness Sir Frederick Pollock Knt. at *W.* the —— day of —— in the —— year of our reign. By the remembrance rolls; by the said act of parliament made in the thirty-third year of the reign of the late King Henry the Eighth; by warrant of our chief baron; and by the barons.

VINCENT.

### *Liberate.*[a]

Victoria &c. to the Sheriff of —— greeting: Whereas *C. D.* [*as in last*]. And you have returned to us that the said *C. D.* was not found in your bailiwick after our writ was delivered to you but that you have taken into our hands all the lands and tenements goods and chattels of the said *C. D.* in your bailiwick and caused them to be extended and appraised according to the tenor of our writ aforesaid to wit —— messuages which are appraised at £—— &c. [*as in the return*]. Therefore we command you that you deliver to the said *A. B.* all the lands and tenements goods and chattels aforesaid by you so taken into our hands if he will have them by the extent and appraisement aforesaid to hold according to the form of the ordinance aforesaid until he shall be satisfied of his debt aforesaid: And in what manner &c.

**Exigencies of writ.**

The writ of extent in chief commands the Sheriff to enter liberties (if need be); to take the body; to find by inquisition of twelve men, what lands and tenements, with their yearly value, *C. D.* had in the Sheriff's bailiwick on the day he first became the Queen's debtor, or at any time since; and also what lands and tenements, with their yearly values, he had in the bailiwick at the time of issuing the writ; also, to find, by like inquisition, what goods and chattels, and of what sort and price; his debts, credits, specialties, and sums of money, in his own right, or any one in trust for him; that he extend and appraise the same, and seize them into his hands; with the usual *proviso*, mentioned in the baron's *fiat*, as to the goods and chattels, viz. to *seize*, but not to *sell* them, until otherwise commanded. Such are the substantial requirements of the writ.

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[a] A *Liberate* must issue to enable the Sheriff to deliver; *Giles* v. *Grover*, 9 Bing. 152.

How Crown debts affect lands, &c.

It may be well to repeat here the statement respecting the *binding force* of Crown debts, upon the lands and goods of Crown debtors, for if it be kept steadily in view, neither the Sheriff nor the jury will have any difficulty, as to the time to which their attention must be directed in finding the property. Debts of record bind the debtor's lands, from the time of his becoming debtor to the Crown, and this by the common law. Debts not of record bind his lands, from the time they are entered into, by the 33 Hen. 8, c. 39, s. 50.[a] At common law (and the Crown is not affected by the Stat. of Frauds), the goods of the debtor are bound from the *teste* of the writ.[b]

How executed.

On receipt of the writ, the Sheriff issues his summons to the defendant, and to all his debtors, to appear and disclose the nature of their property, debts, &c.; likewise, to all other persons, on pain of attachment, who can give the required information. He also summons a jury of twelve men, as in other cases.[c] The *capias* clause is not usually enforced. If enforced, he cannot be admitted to bail; the statute of bail bonds not extending to the Crown. And a bankrupt may be arrested, during his ordinary privilege, because the prerogative of the Crown is not affected by the Bankrupt Act.[d] So, if arrested, after discharge under the Insolvent Debtors' Act, he will not, on that account, be released from custody.[e] Where the Sheriff had over and above the person of the debtor seized property more than sufficient to cover the demand, he was discharged.[f] A party in custody under this writ was allowed voluntarily to escape, but was retaken, and restored into the same custody, and under the same writ: held, that he was rightly in custody, and was not entitled to his discharge. The foundation of this decision was, that the Crown is not affected by the laches of its own officers.[g] What is meant by lands, tenements, goods, and chattels, needs no explanation. But a word or two as to his *debts*. They comprehend money in

Arrest.

What may be seized.

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[a] *Ante*, p. 158: and see *Reg.* v. *Ellis*, 4 Exch. 652; 6 ib. 924, where an attempt was made to defeat the Crown by exercising a power of appointment.

[b] *Giles* v. *Grover*, 9 Bing. 186; *ante*, p. 160.

[c] West, 303.

[d] *Ex parte Temple*, 2 Rose, 22.

[e] *Rex* v. *Seton*, 8 Price, 671; *Reg.* v. *Bennison*, 1 D. & L. 613.

[f] *Rex* v. *Kinnear*, 3 Price, 536.

[g] *Reg.* v. *Renton*, 2 Exch. 216.

the defendant's possession;[a] debts by simple contract, or by specialty, although not due, the Sheriff must seize.[a] Any one is in privity with the Crown who knows that the money which he receives is the money of the Crown.[b] It seems, that on an extent *in chief,* the Crown may seize debts found to be due to its debtor *ad infinitum;* but, on an *extent in aid,* not beyond the *third degree,* counting the Crown debtor as one of the degrees.[c] The Crown cannot avoid an equitable mortgage;[d] or the lien of a factor;[e] or of a wharfinger;[f] or a *bonâ fide* assignment in trust for creditors;[g] a mortgage, or pledge;[h] or any other similar assignment, or charge, upon the goods before the process of the Crown attaches. But they may be taken, subject to such liabilities as the debtor has created. So things *in custodiâ legis* by distress,[h] or under a *fieri facias,*[i] *before sale,* may be taken under this writ, for no inception of an execution can bar the Crown.

**Sheriff can only seize, not sell.**

The Sheriff has no power, by virtue of this writ, to levy or receive the *debts,* found on the inquisition. He is merely to *seize* them. The seizure is merely nominal; the finding, through the medium of the jury, is the seizure—it is a seizure in law. The seizure is the inception of the execution, delivery under a *liberate* being the completion, analogous to the sale under a *fi. fa.*[k]

**Inquisition.**

The Sheriff must, as to witnesses, questions, &c., conduct the inquiry properly, otherwise the Court will quash the inquisition.[l] The inquisition may be adjourned, or another holden before the return day of the writ, to find property not found by the first; in which case, both inquisitions are returned to the Court.

**Several writs, priority of.**

An immediate extent, and an extent in chief, in the second or in any degree, are to be satisfied before an extent in aid of a prior teste;[m] *inter se,* according to their teste.[n]

### *Juryman's Oath.*[o]

You shall well and truly inquire what lands and tenements and of what yearly value *C. D.* had in my bailiwick on the —— day of —— in the —— year of the reign of her present Majesty on which day he was found indebted to her Majesty or at any time since and what goods and chattels and of what sorts and values and of what debts credits specialties and sums of money the said *C. D.* or any person or persons to his use or in trust for him now hath or have in my said bailiwick and that you appraise such goods and chattels so that I may extend seize and take the same into her Majesty's hands until her Majesty shall be fully satisfied the sum of £—— due to her Majesty upon an extent directed to me tested the —— day of —— in the —— year of her reign.

So help you God.

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[a] West, 172; 1 & 2 Vict. c. 110.

[b] *Reg.* v. *Adams,* 2 Exch. 299; *Rex* v. *Ward,* ib. 301, n.

[c] West, 303; *sed vide, R.* v. *Lushington,* 1 Price, 94.

[d] *Casberd* v. *Att.-Gen.* 6 Price, 411.

[e] *The King* v. *Lee,* 6 ib. 369.

[f] *The King* v. *Humphrey,* 1 M'Cl. & Y. 173.

[g] *Giles* v. *Grover,* 9 Bing. 139; West, 115.

[h] *Rex* v. *Cotton,* Parker, 112; West, 116.

[i] *Giles* v. *Grover, suprà.*

[k] Ib.

[l] *Rex* v. *Bickley,* 3 Price, 454.

[m] *Rex* v. *Larking,* 8 Price, 683.

[n] *Reg.* v. *Quash,* Parker, 281; West, 118.

[o] For affirmations, see *ante,* pp. 69, 70.

### *Return.*[a]

The within-named *C. D.* is not found in my bailiwick. The residue of the execution of this writ appears in the inquisition hereto annexed.

The answer of &c.

### *Inquisition.*[b]

W. (to wit.) An inquisition indented taken at the house of —— known by the name or sign of the —— in the said county the —— day of —— in the —— year of the reign of our sovereign lady Victoria by the grace of God of the U. K. of Great Britain and Ireland Queen defender of the faith &c. before me —— Sheriff of the said county by virtue of H. M.'s writ of extent to me directed and to this inquisition annexed on the oaths of *A. B.* [*here name the twelve jurors*] honest and lawful men of my bailiwick who being chosen tried and sworn on their oath say that *C. D.* in the said writ named on the —— day of —— in the year aforesaid that is to say at the time of issuing the writ was possessed of the goods and chattels following that is to say [*here state the goods*] as of his own goods and chattels and the said jurors do appraise and value the same at the sum of £—— ; all which said goods and chattels I the said Sheriff have seized and taken into H. M.'s hands: And the jurors aforesaid upon their oath aforesaid further say that —— of &c. was on &c. indebted to the said *C. D.* in £—— for &c. and that —— of &c. was on &c. indebted to the said *C. D.* in £—— for &c. all which said debts sum and sums of money I the said Sheriff have taken and seized into H. M.'s hands: And the jurors aforesaid upon their oath aforesaid further say that the said *C. D.* on the —— day of —— A. D. —— was seised in his demesne as of fee of and in &c. with the appurtenances thereto belonging situate and being at —— in the parish of —— in the said county and in the occupation of —— of the clear yearly value of £—— in all issues beyond reprizes which I the said Sheriff have seized and taken into H. M.'s hands; and that said *C. D.* hath not any other or more goods or chattels debts credits specialties or sums of money or any other or more lands or tenements in my bailiwick to the knowledge of the said jurors which can be extended appraised or seized into her Majesty's hands. In witness whereof as well I the said Sheriff as the said jurors to this inquisition have set our seals the day year and place above-mentioned.

*J. B.*
*G. S.* &c.

Poundage, &c.

As the Sheriff's power, under *this* writ, is not to *sell* lands and goods, but simply to seize; and as his power, on an extent against the Crown debtor, is not to collect or levy the debts due to him, but simply to *seize*, it follows, that he is not entitled (even if he should receive such debts) to *poundage.*[c]

On the return of the *extent*, a rule or order is entered on the back of it by the prosecutor's clerk in Court. "If no one shall appear and claim the property of the goods, &c., mentioned in the inquisition on or before that day se'nnight, a writ of *venditioni exponas* shall issue to sell the same."[a] If no one appear within the time specified in the rule, the writ issues without any motion in Court. The debtor is entitled to notice of the intended sale.[b]

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[a] The Sheriff may return *non est inventus*, and that the debtor hath no goods or lands, Dalt. 234; or *cepi corpus*, and the seizure of the lands, ibid.; or that the debtor is a clerk, ibid.; or that the lands, &c., are already extended, or that another is in by descent, for that they are not to be put out of possession without a *scire facias*, Fitz. Ret. 112; or that a third party has possession of the goods: see *Reg.* v. *Austin*, 10 M. & W. 692. A return that he has delivered such lands without saying *there are no other lands* is bad, Brownl. 37.

[b] See *ante*, p. 199. If *lands*, &c., are taken, they must be properly described; and it should appear how they came to be the defendant's property. So, if *debts* are found, it should be stated for what; as for goods sold, money lent, &c.; if *bills or notes*, their dates, by whom drawn, accepted, indorsed, &c., should appear, and how they became the debtor's property.

[c] Tidd's Pr. 1057.

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[a] West, on Extents, 174.

[b] See *The King* v. *Mares*, 2 Price 155.

# CHAPTER VI.

## ACTIONS AGAINST HIGH SHERIFF.

### SECTION I.

**Respondeat superior.**

**Extent of rule.**

As applied to the High Sheriff and his officers, the maxim *respondeat superior* prevails to the fullest extent; it approaches well nigh to an universal truth. For all civil purposes, the law regards them as *one*. He is answerable *civiliter* but not *criminaliter*, for the acts of his bailiff, is the language of the books. This is explained to mean, that he may be fined, and amerced, or be mulcted in damages, but not imprisoned or indicted.[a] The relation between them has been sometimes compared to that of master and servant; sometimes to that of principal and agent. To a certain point, the comparison may be just—to that where it is lost sight of in the stern requirements of public policy; but beyond this there seems neither similitude nor analogy. Whether the nature of the duties he has to discharge towards the world, or his relation to the Court, or the security he takes, or is supposed to take, from his officers, casts upon him a different or more enlarged responsibility, is difficult to determine—perhaps, in a practical view, needless to determine; for if anything in law can be said to be settled and agreed upon, it is, that the maxim of *respondeat superior* ranges over the whole field of *civil* remedies, and ceases only to apply to the Sheriff for the acts of his officers, where the *criminal* boundary begins. Thus, he is liable, not only for acts of negligence, but for wilful and fraudulent acts, and for such as might warrant even a criminal prosecution, as for extortion, and the like.[b] On a *penal* statute, he has been held liable at the suit of the party grieved, and also at the suit of a common informer.[c] But to charge him for the act of his officer, two things must occur:—1st. The Sheriff must be acting in a *ministerial*, and not in a *judicial* capacity;[d] 2ndly. The officer, for whose conduct he is sought to be charged, must be acting in execution of an authority received from the Sheriff.[a] Thus, where the bailiff was originally authorised by the Sheriff's warrant to execute process, and, upon it, he entered and seized; afterwards, a *supersedeas* came, and was duly served on the bailiff, and a demand of the goods made upon him; it was held that, for the conversion of the bailiff, *after* the supersedeas, the Sheriff was not liable, being *an act done not under the Sheriff's authority, but in defiance of it.*[b] So when the bailiff, in executing a *ca. sa.*, receives the amount of debt and costs (as he is not authorised to do it), the Sheriff is not liable for the consequences.[c] If a fi. fa. be issued against the goods of C. D., and the bailiff, by mistake, seize the goods of E. F., the Sheriff is liable, for the bailiff is acting in execution of, or, as the books happily express it, *under colour* of an authority from the Sheriff.[d] For the same reason, if an arrest be made by the bailiff after the return day of the writ;[e] or an arrest be made under a *fi. fa.*, and the like.[f]

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[a] *Laycock's ca.* Latch. 187; S. C. Noy, 90; *Ackworth* v. *Kempe*, Dougl. 40; *Woodgate* v. *Knatchbull*, 2 T. R. 148; *Saunderson* v. *Baker*, 3 Wils. 309; *Sturmy* v. *Smith*, 11 East, 27; *Parrot* v. *Mumford*, 2 Esp. 585: and see *Brown* v. *Copley*, 8 Sc. N. R. 358; *Woods* v. *Finnis*, 7 Exch. 372.

[b] Ibid.; and see *Raphael* v. *Goodman*, 8 Ad. & E. 567; *Smart* v. *Hutton*, ib. 568, n.

[c] *Pechell* v. *Layton*, 2 T. R. 512, 712; *Stanway* v. *Perry*, 2 B. & P. 157; *Sturmy* v. *Smith*, 11 East, 24.

[d] *Holroyd* v. *Breare*, 2 B. & A. 478; *Tinsley* v. *Nassau*, M. & M. 52; *Tunno*

It is a familiar rule, that a servant or deputy is not personally chargeable for neglect of duty, only for acts of misfeazance. By the same rule, neither can an Under-sheriff nor a bailiff be personally charged for any *nonfeazance*, or neglect of duty; for such things the superior alone must answer. But the servant in the one case, and the officer in the other, may be personally sued for any act of *misfeazance.*[g] For instance, if a bailiff, who has a warrant from the Sheriff to execute a writ, suffer his prisoner by neglect to escape, the Sheriff shall be charged for it, and not the bailiff. But if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself.

The maxim—*omnis ratihabitio retrotrahitur et mandato æquiparatur*—applies to the Sheriff as well as to any other person. But he cannot be made a *trespasser* by relation; for although a fiction of law may give a right, it cannot create a wrong.[h]

**Relation between High Sheriff and his officers.**

As the Sheriff is so far above the drudgery of his office as seldom, if ever, of himself, to take an active part in it; add to this, the necessity by law to appoint an Under-sheriff and deputies for certain purposes, it is of great importance to ascertain the relation between him and his officers, and that between them and the world at large. This has been already done in part,[i] but it may be well to repeat here, that the Under-sheriff is the *general*

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v. *Morris*, 2 C. M. & R. 298; *Pitcher* v. *King*, 9 Ad. & E. 290: and see *Brown* v. *Copley*, 8 Sc. N. R. 354.

[a] 2 Roll. Abr. 552, pl. 10; *Cook* v. *Palmer*, 6 B. & C. 739; *Crowder* v. *Long*, 8 B. & C. 598; *Brown* v. *Copley*, 8 Sc. N. C. 363; *Smart* v. *Hutton*, 8 Ad. & E. 568, n: and see *Smith* v. *Pritchard*, 8 C. B. 588.

[b] *Brown* v. *Copley*, 8 Sc. N. C. 362.

[c] *Woods* v. *Finnis*, 7 Exch. 372.

[d] *Ackworth* v. *Kempe*, Dougl. 40.

[e] *Parrot* v. *Mumford*, 2 Esp. 585.

[f] *Smart* v. *Hutton*, 8 Ad. & E. 568, n.

[g] *Lane* v. *Cotton*, 12 Mod. 488.

[h] *Balme* v. *Hutton*, 2 Cr. & J. 31; *Garland* v. *Carlisle*, 2 C. & M. 31; 3 M. & W. 152, S. C.; *Cooper* v. *Chitty*, 1 Smith's L. C. 220.

[i] *Ante*, pp. 23, 27, 31. See also *Doe* d. *James* v. *Brawn*, 5 B. & A. 243; *Doe* d. *Rowley* v. *Barnes*, 8 Q. B. 1042.

*deputy* of the High Sheriff for all purposes, within the scope of his office; and that a bound bailiff is only the High Sheriff's servant or agent to do his bidding in a *particular* transaction: that is to say, he is the special officer of the High Sheriff for the individual occasion, wherein he is employed, and for that individual occasion only. This distinction, kept steadily in view, will explain many things apparently difficult, more especially the effect of *admissions* accompanying some official act, and brought forward to show the privity between them.

How proved.

It is usual, indeed universal, for a warrant *in writing* to be granted to the bailiff; but, with the exception of a precept in nature of a *withernam*, there does not appear to be any obligation upon the Sheriff to grant a warrant or precept in writing. A parol command seems, in all cases, except as aforesaid, sufficient in law to create authority. Now, seeing that an agent's authority, to do a particular act, is in writing; seeing, also, that the rules of evidence require the best, or rather the highest degree of evidence the matter admits of, to be produced, such written authority or warrant should be produced, on an issue involving the question of authority or no authority. The warrant, after execution, is either retained by the officer, or returned to the office whence it issued. When retained, a *sub. duc. tec.* must be served upon him. When returned, a notice to produce must be given, and secondary evidence of it will be admissible, in the event of its non-production. Where it had been returned by the bailiff to the Under-sheriff, the Sheriff still being in office, it was held that a notice to produce, served upon the attorney of the *Sheriff*, was sufficient.[a] Where the bailiff had given the warrant to a third person, and it could not be found, after diligent inquiry, secondary evidence of its contents was admitted, without a notice given to the defendant to produce it.[b] A warrant obtained from the officer of the London agent of the Sheriff is sufficient to connect the Sheriff with the acts of the officer executing it.[c] Where they proved him to be a bound-bailiff, and produced and proved a paper, received from him purporting to be a copy of the warrant, it was held insufficient.[d] And it has been held insufficient to produce an examined copy of the warrant, with the bailiff's name indorsed on it, though the Sheriff had returned *cepi corpus*.[e] So where an examined copy of the writ and return, with the bailiff's name written on the margin, was produced, the evidence was considered defective.[f] But, in an action for not arresting, the privity was held sufficiently established by a person belonging to the Sheriff's office, who had indorsed the bailiff's name on the writ produced.[g] In another case, evidence of a like kind was given and held sufficient; in the latter case, however, it was in evidence, that it was the custom of the office to indorse upon the writ the name of the bailiff who was to execute it.[a] So where an examined copy of the writ, as returned by the Sheriff with the officer's name indorsed, was produced, and the writ was shown to have been executed by a person of that name, and that the custom of the Sheriff's office was to grant a warrant to the officer whose name was indorsed on the writ, or, if not, to strike the name out, and insert that of another officer, the evidence was held *primâ facie* sufficient to fix the Sheriff.[b] So, where it was proved that a bail-bond, which had been executed and delivered to the bailiff, had been returned to the Sheriff's, and that he had returned *cepi corpus*, the agency was held sufficiently established.[c] So, where a paper was produced from the Sheriff's office containing an order to the bailiff to give the necessary instructions for making a return to the writ in question, and containing his answer, the privity between the Sheriff and the bailiff, as to the execution of the writ, was held sufficiently established.[d] Where the bailiff proved he had seized under a warrant brought to him by one who said it came from the Sheriff's office, and that he knew the handwriting in it, but had since lost it, the evidence was held sufficient.[e] So, where the plea admitted the officer, who arrested, to be the agent of the defendant for that purpose, it was held unnecessary to produce the warrant.[f] When it is necessary to prove the writ, the warrant reciting the writ seems not to be evidence of it.[g]

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[a] *Taplin* v. *Atty*, 3 Bing. 165.

[b] *Minshall* v. *Lloyd*, 2 M. & W. 450.

[c] *Shepherd* v. *Wheeble*, 8 C. & P. 534.

[d] *Drake* v. *Sykes*, 7 T. R. 113.

[e] *Martin* v. *Bell*, 1 Stark. 417.

[f] *Jones* v. *Wood*, 3 Camp. 228; *Hill* v. *Sheriff of Middlesex*, 7 Taunt. 8; *Moryan* v. *Brydyes*, 2 Stark. 314; *Fermor* v. *Phillips*, 5 Moore, 183.

[g] *Francis* v. *Neave*, 3 B. & B. 126.

**Admissions of officers.**

The Under-sheriff's admissions, he being the *general deputy* of the High Sheriff, are evidence against the Sheriff, without previous proof of his authority in the particular transaction.[h] A bound bailiff's, he being an officer in the particular transaction, and in that alone, are inadmissible, until the connection between him and his superior is established by the warrant or otherwise; and even then his admissions will be evidence only in the same manner, and to the same extent, as those of any other agent.[i] Again, it is not every admission that will affect the Sheriff; thus, the admissions of the Under-sheriff must accompany some official act done, or they must tend to charge himself, otherwise they will not affect the Sheriff.[k] An Under-sheriff's letter, produced by the plaintiff to affect the Sheriff, was held to be evidence of the facts therein stated, which tended to excuse him.[a] The bailiff's general conversation with any indifferent person is not evidence against the Sheriff.[b] Declarations made by a bailiff while the debtor is in his custody are admissible against the Sheriff for an escape.[c] So in an action against the Sheriff for a false return to a writ, what was said by the bailiff, to whom the warrant under it was directed, when asked by the plaintiff's attorney before the return of the writ, why he did not execute it, is evidence against the Sheriff.[d] Declarations made by the officer whilst in possession under a *fi. fa.*, after the return of it, are evidence against the Sheriff.[e] So, when the Sheriff had used the affidavit of his officer on an interpleader motion, the affidavit was used against him, although the deponent was in Court, and not called.[f] So the declarations and acts of a replevin Clerk, at the time of his taking the bond, were admitted as evidence against the Sheriff, though there was no proof, except from those declarations and acts, that he was a replevin Clerk at the time.[g] If an execution creditor has indemnified the Sheriff, what he says is evidence in an action of trespass against the Sheriff for taking the plaintiff's goods under an execution against a third person.[h] Whenever the law places the Sheriff, because of his laches, in the place of the debtor, as regards the creditor, the debtor's admissions will affect the Sheriff;[i] for instance, in an action against the Sheriff for an escape on mesne process, an admission by the defendant in the former action, as to his liability, is evidence against the Sheriff.[k]

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[a] *Tealby* v. *Gascoigne*, 2 Stark. 202.

[b] *Scott* v. *Marshall*, 2 C. & J. 233.

[c] *Martin* v. *Bell*, 1 Stark. 416.

[d] *Jones* v. *Wood*, 3 Camp. 229.

[e] *Moon* v. *Raphael*, 2 Sc. 489.

[f] *Barsham* v. *Bullock*, 10 Ad. & E. 26; *Reid* v. *Poynts*, 8 Dowl. 410.

[g] *Glave* v. *Wentworth*, 6 Q. B. 173, n; *White* v. *Morris*, 11 C. B. 1015; *Haylock* v. *Sparke*, 1 E. & B. 485; *è contrà*, *Bessey* v. *Wyndham*, 6 Q. B. 166.

[h] See p. 227; *Doe* d. *James* v. *Brawn*, 5 B. & A. 243; *Doe* d. *Bowley* v. *Barnes*, 8 Q. B. 1042.

[i] *Drake* v. *Sykes*, 7 T. R. 113; *North* v. *Miles*, 1 Camp. 389; *Bowsher* v. *Calley*, 1 Camp. 391, n.

[k] *Snowball* v. *Goodricke*, 4 B. & Ad 541.

How Sheriff ought to plead.

The execution creditor, to justify his taking body or goods under process, must show the judgment and writ.[l] When the plaintiff is other than the execution debtor, the Sheriff or his officer must show both judgment and writ.[m] When the execution creditor or debtor sues either the Sheriff or his officer, the writ alone is sufficient.

Where an officer for whom the writ or warrant would of itself have been a justification, joins in pleading with the party, who can only defend himself on the validity of the judgment or proceeding, he, the officer, stands or falls by the entire plea.[n]

No writ of execution, except an *elegit*, need be returned;[o] and therefore a Sheriff, justifying under one, need not, in general, show their return; the distinction being, in this respect, between a justification under mesne and final process.[a] This is the general rule; but if any ulterior process in execution against the goods be indispensable, to complete the justification, then it may be necessary to show to the Court the return of the prior writ, in order to warrant the issuing of the other.[a]

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[a] *Haynes* v. *Hayton*, cited in *Bessey* v. *Windham*, 6 Q. B. 172.

[b] *North* v. *Miles*, 1 Camp. 390.

[c] *Bowsher* v. *Calley*, 1 Camp. 391, n.

[d] *North* v. *Miles*, 1 Camp. 359.

[e] *Jacobs* v. *Humphrey*, 2 C. & M. 413.

[f] *Brickell* v. *Hulse*, 7 Ad. & E. 455. See further Rosc. on Evid., tit. *Admissions by Agents.*

[g] *Plumer* v. *Brisco*, 11 Q. B. 46.

[h] *Proctor* v. *Lainson*, 7 C. & P. 629.

[i] *Williams* v. *Bridges*, 1 Stark. 42; and see *Coole* v. *Braham*, 3 Exch. 185.

[k] *Williams* v. *Bridges*, 2 Stark. Rep. 42; *Kempland* v. *Macauley*, Peake, 95.

[l] 1 Wms. Saund. 298, n. (*e*).

[m] *White* v. *Morris*, 11 C. B. 1034.

[n] *Philips* v. *Biron*, 1 Str. 509; *Smith* v. *Bouchier*, 2 Str. 993; *Morse* v. *James*, Willes, 122; *Andrews* v. *Morris*, 1 Q. B. 17. As to the mode of *pleading*, in general, in such cases, see *Greene* v. *Jones*, 1 Wms. Saund. 298.

[o] *Ante*, p. 171.

A Sheriff may justify under a writ, though it be irregular.[b]

Notice of action.

The Sheriff is not entitled to any notice of action; for by the law of England, bringing an action is a sufficient demand and notice, and, whenever the contrary is the case, it is and must be matter of legislative enactment.[c]

## SECTION II.

### FOR ACTS OF TRESPASS.

FOR any wrong done by the Sheriff, acting *judicially*, no action will lie against him, though it be done maliciously. In such a case, however, he may be punished by criminal information or indictment.[d] But for any wrong done by him or his officers when acting *ministerially*, the law obliges him to make compensation in damages to the party injured.

The general principles of the Sheriff's liability for the acts of his officers have been already explained; but, it may be convenient for practitioners to have collected a few instances of what formerly would have been classed under the general name of *trespass*. Thus, when the process of a superior or inferior court has been misapplied, as if A. or his property be taken upon process against B. or his property, the Sheriff is a trespasser.[e] So if process be abused, as if he break open an outer door, or arrest out of the bailiwick, or after the return day of the writ;[f] or execute a *fi. fa.* after notice of allowance of a writ of error;[g] or detain a party on a *ca. sa.* after he tenders the debt and costs; or after notice from the plaintiff that he has released the debt;[h] or retake one after a *voluntary* escape on a *ca. sa.*;[i] or if, after directions from the plaintiff not to execute the writ, he does execute it;[i] or seize under a *fi. fa.* fixtures of the defendant, being the freeholder, he is liable as a trespasser; so where after seizure and sale by auction of chattels real under a *fi. fa.*, the Sheriff remained in possession an unreasonable time for the further execution of the writ.[a] So when he continues in possession of goods more than a reasonable time, he becomes a trespasser.[b] No action will lie against him or his officer for arresting a party permanently or temporarily privileged from arrest, though done with a knowledge of the fact, and from malicious motives.[c] So be is justified in taking a defendant in execution under a writ which pursues the name in the action on which the judgment has been obtained, though that be not the defendant's proper name.[d] If father and son bear the same name, and a writ of *fi. fa.* issue against the son, without the addition of *the younger*, *primâ facie* the father is intended; but this *primâ facie* intendment may be rebutted, and the Sheriff made liable for taking the father's goods, by showing that the judgment was obtained and the writ issued against the son.[e]

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[a] *Cheasley* v. *Barnes*, 10 East, 78. In *Rowland* v. *Veale*, Cowp. 18, the ca. sa. was issued out of an inferior court.

[b] *Ante*, pp. 5, 171, 185.

[c] *Copland* v. *Powell*, 1 Bing. 373.

[d] See *Dicas* v. *Lord Brougham*, 1 M. & Rob. 309; 1 Ch. Pl. 182, 6th edit.

[e] *Ackworth* v. *Kempe*, Dougl. 40; *ante*, p. 227.

[f] *Parrot* v. *Mumford*, 2 Esp. 585.

[g] *Belshaw* v. *Marshall*, 4 B. & Ad. 336.

[h] *Barker* v. *St. Quintin*, 12 M & W. 441: and see *Gregory* v. *Slowman*, 1 E. & B. 370; *Woods* v. *Finnis*, 7 Ex. 363.

[i] *Atkinson* v. *Matteson*, 2 T. R. 172: and see *Reg.* v. *Renton*, 2 Exch. 216.

Declaration. The form of the declaration (in the framing of which few, if any, difficulties can well arise since the "Common Law Procedure Act," 1852) necessarily depends upon the nature of the wrong complained of, that is to say, whether it be a wrong to the person, to the personal or to the real property of the plaintiff. For instance:—That the defendant broke and entered a certain dwelling-house of the plaintiff, situate, &c., (or certain land of the plaintiff, called ———, &c.,) and there seized and carried away, to wit, &c.; and the plaintiff claims £——. Or that the defendant seized and laid hold of the plaintiff and carried him to prison, and kept him there imprisoned for —— hours. Pleas. And the plaintiff claims £——. By the new pleading rules of Hil. T. 1853, it is provided that "in actions for torts the plea of Not Guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the indictment, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. All matters in confession and avoidance shall be pleaded specially. In actions for taking, damaging, or converting the plaintiff's goods, the plea of not guilty shall operate as a denial, of the defendant having committed the wrong alleged by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein."

The plea of *not possessed* puts in issue the property as well as the possession.[f] Under this plea, the defendant may show, that the goods had been fraudulently assigned to the plaintiff, and that they were, in truth, the goods of the party against whom the writ issued;[a] but he cannot show under it that the assignment was made after the delivery of the writ to the Sheriff; that must form the subject-matter of a special plea; for the assignment, if *bonâ fide*, passed the property, although the Sheriff may levy upon it, unless sold in market overt.[b] The question of fraud or no fraud is for the jury, and not for the Court.[c]

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[a] *Playfair* v. *Musgrove*, 14 M. & W. 239.

[b] *Ash* v. *Dawnay*, 8 Exch. 239.

[c] *Tarlton* v. *Fisher*, 2 Dougl. 671; *Cameron* v. *Lightfoot*, 2 Wm. Bl. 1190; *Magnay* v. *Burt*, 5 Q. B. 381: and see *Yearsley* v. *Heane*, 14 M. & W. 328; *ante*, pp. 133, 205.

[d] *Fisher* v. *Magnay*, 1 D. & L. 40; *ante*, p. 205.

[e] *Jarmain* v. *Hooper*, 7 Sc. N. R. 663; 6 M & G. 827, S. C.

[f] *Jones* v. *Chapman*, 2 Exch. 803; *Slocombe* v. *Lyall*, 6 ib. 119.

Having stated the general effect of the pleas of *not guilty* and *not possessed*, we must refer the pleader to books of precedents for pleas in confession and avoidance, at once numerous and stamped with authority.

The plea of payment of money into Court, in actions of tort, if the declaration be *specific*, admits the cause of actions so specifically stated. But when the declaration is *general*, the plea admits a cause of action to the amount paid into Court, but operates as an admission for no other purpose.[d]

**Evidence.**

In order to prove the fraud, declarations made by the assignor at the time of executing the bill of sale are admissible, as part of the *res gestæ*, but not if made at another time.[e] Where A. sued out a writ of *fi. fa.* against the goods of B., and the Sheriff executed a bill of sale of certain goods to A., after this B. remained in possession of the goods, and the Sheriff again took them under another execution against B.: held, that in an action brought by A. against the Sheriff for taking these goods, the declarations of B. were evidence for the defendant to show that A.'s execution was merely colourable.[f] If he means to say that a deed, good as against all except creditors, is fraudulent and void, he must show that he represents a creditor.[g]

The evidence necessary to establish the connection between the Sheriff and his officer has been already pointed out.[h]

**Damages.**

The damages recoverable in these actions are such as the plaintiff can prove that he has actually sustained. Where the goods, &c., are sold, and the plaintiff never regains possession, the jury may give their full value.[i] If he wrongfully seize goods which are afterwards taken from him by another wrongdoer, the owner of the goods may, in an action against the Sheriff, recover as special damage the amount necessarily paid to the other wrongdoer, in order to get them back.[k]

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[a] *Ashby* v. *Minnitt*, 8 Ad. & E. 121.

[b] *Samuel* v. *Duke*, 3 M. & W. 631.

[c] See *Twyne's ca.* 1 Smith's L. C. 1, n.

[d] *Schreger* v. *Carden*, 11 C. B. 851; *Perren* v. *The M. R. & C. Co.*, ib. 855; *ante*, p. 73.

[e] *Phillips* v. *Eamer*, 1 Esp. 356; *Penn* v. *Scholey*, 5 ibid. 243; *Lewis* v. *Rogers*, 1 C. M. & R. 48.

[f] *Willies* v. *Farley*, 3 C. & P. 395.

[g] *White* v. *Morris*, 11 C. B. 1028; *ante*, p. 175.

[h] *Ante*, p. 228.

[i] See *Fouldes* v. *Willoughby*, 8 M. & W. 548.

[k] *Keene* v. *Dilke*, 4 Exch. 388: see also *Gregory* v. *Slowman*, 1 E. & B. 370.

## Section III.

### FOR ACTS OF CONVERSION.

What is a conversion.

Conversion means an act inconsistent with the general right of dominion in the owner of the chattel; therefore, to maintain this action, the goods must be destroyed, or changed in quality, taken, or detained, with *intent* to take them to the defendant's own use, or to deprive the owner of them.[a]

The Sheriff, as we have seen, cannot be made a *trespasser* by relation; but for an act of conversion he may be overreached.[b]

What property plaintiff must have.

To support the action, the plaintiff must have had, at the time of the conversion, a right of property (general or special), and the actual possession, or the right to the immediate possession, as against the defendant, of the subject-matter of the suit.[c] The bare fact of possession of a personal chattel is sufficient evidence of title as against a mere wrongdoer.[d]

Pleadings.

The form of declaration given by "The Common Law Procedure Act, 1852," (from which any other may easily be framed,) is this:—"That the defendant converted to his own use [or wrongfully deprived the plaintiff of the use and possession of] the plaintiff's goods; that is to say, iron, hops, household furniture [*or, as the case may be*]."

By the new pleading rules of Hil. T. 1853 it is provided that "the plea of *not guilty* shall operate as a denial of the defendant having committed the wrong alleged by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property." Under the plea of not guilty, not merely the *fact* of conversion but its *lawfulness* is in issue.[e]

Under the plea of *not possessed* (which is generally pleaded with not guilty) the Sheriff may, amongst other things, set up the *jus tertii;* in other words, that the goods at the time of the alleged conversion were the property of a third person.[f] The property, as well as the possession, is in issue under it.[g] What has been said in the former section, as to fraudulent assignments, equally applies to the plea of not possessed in actions of this kind.[h]

Evidence.

It should be kept in mind that we are only writing of actions brought against the *Sheriff;* being so, it would be idle to enter into the question, when a demand and refusal is requisite, or when they amount to or afford evidence of a prior conversion; for if he has exposed himself at all to such an action, it must needs be by a direct act of conversion, as by seizure under a *fi. fa.*, and the like. How the privity or connection between him and his officers is established in evidence, and how far, and when, he is affected by their admissions, has been already explained.[a]

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[a] *Fouldes* v. *Willoughby*, 8 M. & W. 548; *Wilkinson* v. *Whalley*, 6 Sc. N. C. 640; *Simmons* v. *Lillystone*, 8 Exch. 442.

[b] *Cooper* v. *Chitty*, 1 Smith L. C. 220.

[c] *Gordon* v. *Harper*, 7 T. R. 9; 2 Wms. Saund. 47.

[d] As to its being *conclusive* evidence, see *Elliott* v. *Kemp*, 7 M. & W. 312.

[e] *Whitmore* v. *Green*, 13 M. & W. 107; *Young* v. *Cooper*, 6 Exch. 259; *Jones* v. *Davies*, ib. 664.

[f] *Leake* v. *Loveday*, 5 Sc. N. C. 926.

[g] *Jones* v. *Chapman*, *ante*, p. 232.

[h] *Ante*, p. 233.

**Damages.**

In this action, as a general rule, the proper measure of damages is the value of the thing taken; and, in assessing them, the jury are not limited to its value at the time of the conversion, but may find its value at a subsequent time in their discretion.[b] When, after an act of bankruptcy, a Sheriff seizes and sells goods, and the assignees bring an action for the conversion, the jury may deduct the expenses of the sale.[c] The price, at which the goods are sold at a Sheriff's sale, is not necessarily the measure of damages, if the sale be wrongful; but when the plaintiff is an assignee, as he must have sold the goods if they had come to him, juries are often induced to return a verdict for no more than the sum at which the Sheriff actually sold.[d] The restitution of the goods may be shown, in mitigation of damages.[e] Special damage may be recovered in this action, if laid in the declaration.[f] When plaintiff succeeds as to part of his claim only, the defendant is entitled to have the issue entered distributively.[g]

## SECTION IV.

### FOR REMOVING WITHOUT SATISFYING YEAR'S RENT.[h]

(Stat. 8 Ann. c. 14.)

THE statute enacts "that from, &c., no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements which are or shall be leased for life or lives, term of years at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking of such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of this act; and the Sheriff or other officer is hereby empowered and required to levy, and pay to the plaintiff, as well the money so paid for rent, as the execution money." By 11 Geo. 4, and 1 Will. 4, c. 11, the statute is extended to process by *pone per vadios* out of the Court of C. P. at Durham.[a]

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[a] *Ante*, pp. 228. 229.

[b] *Greening* v. *Wilkinson*, 1 Car. & P. 625; *Cook* v. *Hartle*, 8 ib. 568.

[c] *Clarke* v. *Nicholson*, 1 C. M. & R. 724.

[d] *Whitehouse* v. *Atkinson*, 3 Car. & P. 344.

[e] *Countess of Rutland's ca.* 1 Roll. Abr. 5; *Moon* v. *Raphael*, 2 Bing. N. C. 310.

[f] *Davis* v. *Oswell*, 7 C. & P. 804.

[g] *Williams* v. *Great Western R. C.*, 3 M. & W. 856.

[h] See *Palgrave* v. *Windham*, 1 Str. 212; *Hodgson* v. *Gascoigne*, 5 B. & A. 88; *Riseley* v. *Ryle*, 11 M. & W. 16; *Forster* v. *Cookson*, 1 G. & D. 60; *Smallman* v. *Pollard*, 1 D. & L. 904; *Cocker* v. *Musgrove*, 9 Q. B. 229; *Wharton* v. *Naylor*, 12 ib. 673, as to the general policy of the statute.

**Cases within the statute.**

Upon the statute of Anne it has been decided that an immediate and not a ground landlord is meant.[b] An executor or administrator is entitled to the benefit of the statute as to arrears due to the testator in his lifetime.[c] A trustee of an outstanding satisfied term, assigned in trust to attend the inheritance, is within its provisions.[d] It extends to an execution at the suit of a defendant for costs, as well as to that of the plaintiff.[e] Goods seized under a *capias utlagatum* are liable for a year's rent.[f] Under a sequestration issued out of the Court of Chancery, the landlord, it seems, is entitled to a year's rent.[g] Goods seized under an extent in aid are not liable to a year's rent.[h] The statute is not confined to an original demise of entire premises, but applies as well to a sub-lessee; and to goods taken in execution on part of the subject-matter of the original demise.[i] The money claimed must be due as *rent;* and due for a year immediately preceding the execution.[k] Rent stipulated by lease to be paid in advance is rent due at the time of the seizure, within the meaning of the statute.[l] The landlord seems entitled to his year's rent without any deduction for poundage.[m] He is entitled to a full year's rent, although he has been used to remit some portion of it to his tenant.[n] Only one year's rent is to be paid, although there be two or more executions.[o] The statute is confined to rent due at the time of the taking; therefore, for rent which accrues after the taking, and during the continuance of the Sheriff in possession, no claim can be made upon the Sheriff: thus a Sheriff, who takes corn in the blade under a *fi. fa.*, and sells it before the rent is due, is not liable to the landlord under the statute, that is, for rent accruing subsequently to the seizure and sale, although he has given notice, and although the corn be not removed from the premises until long afterwards.[a] Again, the statute contemplates a tenancy to which the right of distress is incident, a tenancy subsisting at the time of the execution; therefore, no claim can be made upon the Sheriff for rent which has accrued due since the day of the demise laid in an ejectment for the same premises; for, by bringing ejectment, the landlord treats him as a trespasser and not as a tenant.[b] The statute applies only to cases where the judgment creditor claims adversely to the landlord, and not where the execution is sued out at the instance of the landlord himself.[c] The landlord has a right to his year's rent whether the goods be his tenant's or not;[d] for instance, where under a writ of *fi. fa.* the Sheriff levied on, and removed goods, not the property of the judgment debtor, the owner recovered by action the whole proceeds of the levy. Before the removal of the goods from the premises on which they were, the Sheriff had notice of a year's rent being due, which he did not pay: held, notwithstanding the Sheriff had paid the whole proceeds of the levy to the owner of the goods, that he was liable under this statute for removing the goods without paying the rent.[e]

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[a] See *Brandling* v. *Barrington*, 6 B. & C. 467.

[b] *Bennet's case*, 2 Str. Rep. 787.

[c] *Palgrave* v. *Windham*, 1 Str. 212; Wms. Exors. 670.

[d] *Collyer* v. *Speer*, 4, Moore, 473.

[e] *Henchett* v. *Kimpson*, 2 Wils. 140.

[f] *St. John's Col.* v. *Murcott*, 7 T. R. 259; *Greaves* v. *D'Acastro*, Bunb 194: see *Brandling* v. *Barrington*, 6 B. & C. 472.

[g] Ib.; and *Dixon* v. *Smith*, 1 Swanst. 457.

[h] *Rex* v. *De Caux*, 2 Price, 17.

[i] *Thurgood* v. *Richardson*, 7 Bing. 428.

[k] *Saunders* v. *Musgrave*, 6 B. & C. 524.

[l] *Harrison* v. *Barry*, 7 Price, 600.

[m] *Gore* v. *Gofton*, Str. Rep. 643; *Collyer* v. *Speer*, 4 I. B. Moore, 573; *Davies* v. *Edmonds*, 1 D. & L. 395.

[n] *Williams* v. *Lewsey*, 1 M. & Sc. 92.

[o] *Dod* v. *Saxby*, 2 Str. Rep. 1024; 5 I. B. Moore, 97.

**Notice of landlord's claim.**

In order to make the Sheriff liable, he must know of the landlord's claim, before removal. Express notice is not required by the statute;[f] the notice, usually given to the Sheriff, is only for the purpose of establishing his knowledge of the landlord's claim; and if that knowledge can, by any other means, be brought home to him, at any time before he has parted with the money, he will be compelled to pay the rent.[g] If the execution be overreached by a petition in bankruptcy, the Sheriff, in an action by the assignees, can only, it seems, avail himself of payment to the landlord, by proving that it was made before the filing of the petition, and without notice of a prior act of bankruptcy.[h]

**Bill of sale.**

A bill of sale is not a removal of the goods within the meaning of the statute.[i]

**Where not sufficient on premises to satisfy landlord, &c.**

It may happen, that the goods on the premises are insufficient to satisfy the year's rent; if so, he should withdraw. If he choose to sell, the Court will not stay proceedings, in an action against him, on paying over the proceeds of the sale.[k] If the execution creditor (upon notice) refuse to satisfy the landlord's claim, the Sheriff must not proceed to a sale, but withdraw and return the facts.[l]

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[a] *Gwilliam* v. *Barker*, 1 Price, 274; *Hoskins* v. *Knight*, 1 M. & S. 245. A landlord may now, by the 15 & 16 Vict. c. 25, distrain upon *growing crops* for one year's rent, even while they are *in custodiâ legis. Ante*, p. 384.

[b] *Hodgson* v. *Gascoigne*, 5 B. & A. 88; *Riseley* v. *Ryle*, 11 M. & W. 16.

[c] Ibid.

[d] *Taylor* v. *Lanyon*, 6 Bing. 536.

[e] *Forster* v. *Cookson*, 1 G. & D. 61.

[f] *Andrews* v. *Dixon*, 3 B. & A. 645; *Riseley* v. *Ryle*, 11 M. & W. 16.

[g] *Arnitt* v. *Garnett*, 3 B. & A. 442; *Andrews* v. *Dixon*, 3 B. & A. 646; *Collyer* v. *Speer*, 2 B. & B. 67.

[h] *Lee* v. *Lopes*, 15 East, 230.

[i] *Smallman* v. *Pollard*, 1 D. & L. 904.

[k] *Foster* v. *Hilton*, 1 Dowl. 35: and see 2 B. & Ad. 418.

[l] *Cocker* v. *Musgrove*, 9 Q. B. 234.

**Remedy by landlord.** The landlord's remedy against the Sheriff is,—1. By action on the statute.[a] 2. By motion to the Court. An action for money had and received will not lie against the Sheriff for the year's rent, neither before nor after the sale.[b]

**Declaration.** The declaration states the nature or terms of the subsisting tenancy[c] — the arrear of rent — the levy — notice before removal—and breach of duty—viz. the removing the goods and chattels without paying or satisfying the plaintiff the arrears of rent.

**Pleas.** The wrongful act alleged is not the original taking, but the removing without satisfying the rent. The plea of "*not guilty*" therefore, as at present restricted, simply puts in issue the fact of removal without satisfying the year's rent: if intended to be disputed, the terms of the tenancy—arrears of rent—the levy—notice, &c., must be denied, and all matters in confession and avoidance specially pleaded.

**Evidence.** It is enough to show that some goods were removed; the plaintiff need not show that enough to satisfy the rent was not left.[d] To prove the rent due (if denied), the tenant himself is a competent witness. In *Harrison* v. *Barry*,[e] it was held sufficient to prove the occupation by the tenant, and that it was for the Sheriff then to show that the rent had been paid. The landlord is a competent witness. If the rent be due under a lease it must be produced.[f]

**Damages.** The damages are not limited to the amount produced by the sale.[g]

**Motion to the Court.** The motion to the Court is an application to the equitable jurisdiction of the Court, to have restitution, to the amount of the goods sold, if less than a year's rent; if more, then to have so much as will satisfy a year's rent. Indeed, this seems to be the only remedy (independently of its being a more speedy one under any circumstances) when the removal takes place *before* notice of there being rent due; for, upon motion, the Court will give relief to the landlord, at any time while the proceeds remain in the Sheriff's hands.[h]

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[a] *Barsham* v. *Bullock*, 2 P. & D. 241; *Reid* v. *Poyntz*, 8 Dowl. 410.

[b] *Green* v. *Austin*, 3 Camp. 260.

[c] See *Bristow* v. *Wright*, 1 Smith's L. C. 324.

[d] *Collyer* v. *Speer*, 2 B. & B. 67.

[e] 7 Price, 690.

[f] *Augustien* v. *Challis*, 1 Exch. Rep. 279.

[g] *Foster* v. *Hilton*, 1 Dowl. 38; *Calvert* v. *Joliffe*, 2 B. & Ad. 420.

[h] *Arnitt* v. *Garnett*, 3 B. & A. 442; *ante*, p. 237.

## SECTION V.

### FOR NOT ARRESTING.

A SHERIFF is bound *ex officio* to know the person of every one in his county.[a] He must likewise execute every writ in a reasonable or convenient time; and in the most effectual way.[a] Hence it follows, that if a party against whom he holds a writ, does not abscond, but continues in the daily exercise of his usual occupation, appears publicly as usual, is visible to every person that comes to him about business, and the bailiff neglects to arrest him upon proof of these facts, without proof of express notice to him of such information as would enable him to identify and arrest the party, the Sheriff is liable in damages for a breach of duty.[a]

If the Sheriff, having a *writ of execution* delivered to him, unnecessarily delay putting it in force, an action lies against him, at the suit of the execution creditor, though no actual pecuniary damage has arisen from the default.[b] As regards a writ of *capias*; it is equally the duty of the Sheriff, to arrest on the first opportunity, and an action will lie against him, even before the return day of the writ, if made returnable on a day certain, provided some actual damage has resulted to the plaintiff: a default, after the writ is returnable, implies legal damage.

**Declaration**

The declaration (if the wrongful act have taken place on *mesne* process) should state the cause of action, the writ of summons at the suit of the plaintiff, the judge's order, issuing of capias, delivery to the Sheriff, the debtor's being within the Sheriff's bailiwick, and that a reasonable time had elapsed for making the arrest, but that defendant had not done so; that the month had expired, and still in default; the special damage. If on *final* process (the order, writ of summons, and capias, will, of course, be omitted) the declaration should state the judgment, delivery of writ, &c.; special damage must also be alleged, if the facts warrant the allegation, although not indispensably necessary for the maintenance of the action.[c] It is usual to add other counts, as for an escape, and the like: this, of course, depends on circumstances, which cannot be, *à priori*, determined.

**Pleas.**

The breach of duty or wrongful act here alleged is, the not arresting within a reasonable time; if the cause of action, writ, delivery, or any other material averment be also in dispute, it must be denied, and all matters in confession and avoidance—in excuse or justification—must be specially pleaded.

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[a] *Ante*, p. 171; and *Beckford* v. *Montague*, 2 Esp. 475; *Howden* v. *Standish*, 6 C. B. 509.

[b] *Randell* v. *Wheble*, 10 Ad. & E. 719; *Williams* v. *Mostyn*, 4 M. & W. 145; *Wylie* v. *Birch*, 3 G. & D. 636; *Clifton* v. *Hooper*, 6 Q. B. 476.

[c] *Williams* v. *Griffiths*, 6 D. & L. 449.

**Evidence.** As regards the existence of the cause of action, the same evidence that would be sufficient if the action had been simply between A. and B. (the debtor and creditor) will be sufficient as against the Sheriff. An admission by the debtor is sufficient.[a] If the issuing of the *capias* be in question it is thus proved: if returned and filed, by an examined copy; if not returned, notice to produce should be given to the Sheriff's attorney; and upon proof of the service of the notice, and of the delivery of the writ, and that search has been made at the treasury for the return, secondary evidence will be admissible; the secondary evidence will be supplied by a clerk, or by any one who can speak to the facts. The indorsement of *non est inventus* on a writ of *ca. sa.* is evidence of delivery.[b] The production of a bill of sale, reciting these facts, will also be good evidence as against the Sheriff of the facts so recited.[c] A bound-bailiff may prove that he endeavoured to make the arrest. It is usual, for the purpose of evidence, to give the bailiff notice where the debtor is to be found: if not done, and we have seen for the maintenance of the action that it need not, persons must be called who can of their own knowledge say that the debtor was to be seen as usual, and continued, after the delivery of the writ to the Sheriff, in the daily exercise of his usual calling.

**Damages.** The measure of damages, for such default, is not necessarily the whole debt; but such a sum as the jury may consider equivalent to the real loss. If there has been no actual loss, still, in the case of *final* process, the plaintiff must have nominal damages. If there has been no actual loss, in the case of *mesne* process, he must fail; he is not entitled even to nominal damages.[d]

## SECTION VI.

### FOR NOT ASSIGNING BAIL-BOND.

BAIL-bonds were not assignable at common law; but now, if one be taken upon process at common law, the Sheriff is bound by the statute of 4 Anne, c. 16, s. 20, on the request and cost of the plaintiff, or of his attorney, to assign it; if he refuse to do so, he is liable, in damages, for the consequences.[e] Since the 1 & 2 Vict. c. 110 (the *capias* being wholly collateral), the taking an assignment of the bail-bond no longer affects the right of the plaintiff to proceed in the original action.[f]

**Declaration.** The declaration should state the debt, the writ of summons, the order, capias, delivery of it to the Sheriff, the arrest, the taking of the bail-bond, the non-compliance with its terms, and its consequent forfeiture, the request made to the Sheriff to assign it, offer to pay the costs, and breach of duty. It is usual to add a count for an escape, to guard against the event of a bail-bond not having been taken.

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[a] *Gibbon* v. *Coggon*, 2 Camp. 188; *Rogers* v. *Jones*, 7 B. & C. 86.

[b] *Blatch* v. *Archer*, Cowp. 63; Stark. Ev. 1009.

[c] *Woodward* v. *Larking*, 3 Esp. 286.

[d] *Clifton* v. *Hooper*, 6 Q. B. 468.

[e] See *Posterne* v. *Hanson*, 2 Wms. Saund. 61.

[f] *Betts* v. *Smyth*, 2 Q. B. 113; *Reg.* v. *Sheriff of Montgomeryshire*, 9 M. & W. 448; 2 Wms. Saund. 61, n.

**Plea.** The breach of duty or wrongful act, here alleged, is the refusal to assign the bail-bond. The plea of *not guilty*, therefore, simply puts in issue that fact; any other material averment in the declaration, if disputed, must be denied; and all matters in confession and avoidance, in excuse or justification, must be specially pleaded.

**Evidence.** The evidence necessary to prove the matters of inducement, if denied, has been sufficiently detailed in the preceding section. To show the demand, refusal, and tender of costs of assignment, the person who acted in the matter should be called. If the giving the bail-bond be in issue, notice to produce it should be given, and the service of such notice proved to let in secondary evidence.

**Damages.** The plaintiff, it would seem, is entitled only to such damages as he can prove he has *actually* sustained.

## Section VII.

### FOR CARRYING TO TAVERN, WITHOUT CONSENT, OR TO PRISON WITHIN 24 HOURS.

As appears by the preamble of the 32 Geo. 2, c. 28 (1759), so grievous and oppressive had the conduct of gaolers and inferior officers, in the execution of process for debt, become towards their prisoners, that the legislature felt bound to interfere, and protect them. With this humane intent, it was enacted (amongst other things), "That no Sheriff, undersheriff, bailiff, serjeant-at-mace, or other officer or minister whatsoever, shall, at any time or times hereafter, convey or carry or cause to be conveyed or carried any person or persons by him or them arrested or being in his or their custody, by virtue or colour of any action, writ, process, or attachment, to any tavern, ale-house, or other public victualling or drinking-house, or to the private house of any such officer, or minister, or of any tenant or relative of his, *without the free and voluntary consent of the person or persons so arrested or in custody*, . . . . . nor shall carry any such person to any gaol, or prison, *within twenty-four hours from the time of such arrest*, unless such person or persons so arrested shall *refuse to be carried to some safe and convenient dwelling-house of his her or their own nomination or appointment*, within a city, borough, corporation or market town, in case such person or persons shall be there arrested, or within three miles from the place where such arrest shall be made, if the same shall be out of any city, borough, corporation, or market town, so as such dwelling-house be not the house of the person arrested, and be within the county, riding, division, or liberty, in which the person under arrest was arrested; and then, and in any such case, it shall be lawful to and for any such Sheriff or other officer or minister, to convey or carry the person or persons so arrested, and refusing to be carried to such *safe and convenient dwelling-house* as aforesaid, to such gaol or prison as he, she or they may be sent to by virtue of the action, writ or process against him, her or them." Penalty 50*l.* (over and above such penalties or punishments as he or they shall be liable unto by the laws now in force).

A refusal.

*A refusal* is a condition precedent to the right of the officer to take his prisoner to gaol within twenty-four hours from the time of the arrest. Now, a refusal may be in many ways; a prisoner may nominate, and then refuse to go; or, he may refuse to nominate, or he may nominate and go, and then refuse to stay.[a] A mere omission, or neglect to do an act, is not a refusal (the word implies something more); neither is a mere submission.[b] In one case, the officer said, "*You will go with me to the Granby;*" his prisoner said, "*Very well:*" and it was held not to be a refusal, within the meaning of the statute; it was but a mere submission to the will of one who did not give him, at least inform him that he had a choice of place for a limited time.[c] In another, the prisoner said to the officer, "*May not I be taken to a spunging-house?*" and held insufficient.[d] The party arrested must be distinctly informed of his right of option before he be conveyed to prison.

The place nominated.

With respect to the place nominated; it is clear that the officer has a right to exercise his judgment as to its safety and convenience, otherwise a house might be nominated where a rescue was easy. The words *safe and convenient* dwelling-house are to be understood therefore as safe and convenient for the Sheriff, not for the prisoner.[e] Again, an officer is not bound to take a prisoner to any house he may wish to go to for any purpose his caprice may dictate, as to an attorney *to consult* him; but only to a safe and convenient dwelling-house for the purpose *of remaining there* during the twenty-four hours allowed by law. An insinuation has been thrown out, that an attorney's house, even for the purpose of remaining there, is not a safe and convenient dwelling-house within the meaning of the statute. An attorney might be the only friend through whom the debt could be satisfied or bail given, and that his accidentally being an attorney should preclude a prisoner of his friend's assistance seems an odd conclusion, if not in direct contravention of the statute itself. Moreover, for a Court of Justice to decide so, involves something harsh towards the general body of its own officers.

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[a] *Dewhirst* v. *Pearson*, 1 Cr. & M. 365. The statute applies only to arrest on *mesne* process: *Evans* v. *Atkins*, 4 T. R. 555.

[b] *Simpson* v. *Renton*, 5 B. & Ad. 35.

[c] *Dewhirst* v. *Pearson*, 1 Cr. & M. 372; *Barsham* v. *Bullock*, 10 Ad. & E. 26; *Gordon* v. *Laurie*, 9 Q. B. 64.

[d] Ibid.

[e] *Silk* v. *Humphery*, 4 Ad. & E. 970.

**Time cannot be abridged.**

This space of twenty-four hours cannot be *abridged* of an instant of time. Therefore, the putting a prisoner into a state of being carried to prison before every moment of the time is expired, as the putting him upon a coach, or the like, cannot be justified; for if it could be so abridged the prisoner would not have the twenty-four hours, only a part of them; and, in many cases, the whole of the time might be consumed on the way, and thus the statute be wholly defeated.[a]

The action is at the suit of the party aggrieved, to recover the penalty of 50*l.*[b]

**Declaration.**[c]

The declaration alleges the summons, order, capias, its delivery to the defendant, the arrest and wrongful act complained of, that is, that he carried the plaintiff "to a certain gaol or prison within twenty-four hours from the time of the said arrest, though he, the plaintiff, did not refuse to be carried to a safe and convenient dwelling-house of his own nomination or appointment within three miles from the place where the plaintiff was so arrested, such place not being a city, borough, corporation or market town, and such dwelling-house not being the house of the plaintiff; contrary to the form, &c., whereby and by force, &c., the defendant forfeited and became liable to pay for the said offence to the plaintiff, being the party thereby aggrieved, the sum of 50*l.*"

**Plea.**

To this the defendant may plead "*nil debet,*" and give the special matter in evidence under it.[d] The effect of the plea is to put the plaintiff on proof of all the material averments in the declaration.

**Evidence.**

The evidence necessary to support the plaintiff's case may, it is hoped, be sufficiently collected from the previous remarks upon the *refusal*, &c., as to need no further comment.

**Damages.**

The plaintiff, if he make out his case, will be entitled to the penalty of 50*l.*[e]

## SECTION VIII.

## REFUSING TO ACCEPT BAIL.

(23 Hen. 6, c. 9.[f])

THE statute requires Sheriffs and others to let to bail all manner of persons "in their custody by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, *having sufficient within the counties where such persons be so let to bail*," *&c.*[a]

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[a] Ibid.; 1 Cr. & M. 372.

[b] Sect. 12.

[c] The venue is *local*, 21 Jac. 1, c. 4, s. 2: see 4 Ad. & E. 959; 1 Cr. & M. 365. The first count may be as in *Dewhirst* v. *Pearson* (if the fact) for carrying the plaintiff to a tavern without his free will and consent; the second may be for taking plaintiff to prison within twenty-four hours. In *Barsham* v. *Bullock*, 10 Ad. & E. 26, there seems to have been three or more counts, but the particulars do not appear.

[d] Or not guilty, 21 Jac. 1, c. 4, s. 4. The new pleading rules of Hil. T. 1853, do not affect this plea in a penal action: see *Faulkner* v. *Chevell*, 5 Ad. & E. 213; *Spencer* v. *Swannell*, 3 M. & W. 154; *Jones* v. *Williams*, 4 ib. 375.

[e] Treble costs are abolished by 5 & 6 Vict. c. 97.

[f] Not repealed by the Uniformity of Process Act, nor by the 1 & 2 Vict. c. 110: see *Posterne* v. *Hanson*, 2 Wms. Saund. 59.

If the defendant tender sufficient sureties, that is, persons having sufficient within the Sheriff's bailiwick, and the Sheriff refuse to accept them, he is liable in damage, or he is liable in a *qui tam* action for the penalty of 40*l.* given by the statute.[b]

Declaration. The declaration by the party aggrieved states, that he was duly in custody of the defendant by virtue, &c., which writ was indorsed for bail for £——, and that the plaintiff tendered to the defendant reasonable sureties of sufficient persons having sufficient within the county, to become bail for the appearance of the plaintiff; and that the defendant wrongfully refused to accept the said sureties so offered.

Plea. The breach of duty or wrongful act here alleged is the refusal to accept the offered bail. The plea of *not guilty* therefore simply puts in issue the fact of refusal: any other material averment, if disputed, must be denied; and all matters in confession and avoidance, in excuse or justification, must be specially pleaded. If the action be for the penalty, *nil debet* may be pleaded, and the special matter given in evidence under it.[c]

Evidence. With regard to the evidence no difficulty can well arise. The party aggrieved recovers treble damages, that is, three times the

Damages. single damages; thus, if the jury give 20*l.* the Court will award 40*l.* more.[d] In the *qui tam* action one-half of the 40*l.* penalty goes to the Queen *to be employed to the use of her house*, the other half to the common informer who sues.

## SECTION IX.

### FOR TAKING INSUFFICIENT PLEDGES IN REPLEVIN.[e]

BEFORE the Sheriff or his officer can replevy he must take pledges.[f] By the common law, which still governs a distress *damage feasant*, it is still necessary that pledges for the prosecution, which are merely nominal, *and* pledges *pro ret. hab.* be taken.[g] The stat. of 11 Geo. 2, c. 19 (in matter of *rent*), requires him to take *both*, with this difference only, that it gives the penalty for not prosecuting to the defendant, which at common law belonged to the Crown.[a]

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[a] *Lovell* v. *Sheriffs of London*, 15 East, 324.

[b] No action lies against the Sheriff for taking *insufficient* bail; but he shall be amerced, if he has not the body forthcoming to appear and answer the plaintiff. See 2 Wms. Saund. 61 *f*.

[c] *Ante*, p. 243.

[d] *Buckle* v. *Bewes*, 4 B. & C. 154; Tidd's Pr. 1025.

[e] For not taking a replevin bond, or for losing the bond, an action will equally lie; see *Perreau* v. *Bevan*, 5 B. & C. 284.

[f] See p. 37.

[g] Ib.; Co. Litt. 145 b.

Pledges (*plegii*) are *persons* becoming surety. If the Sheriff take money or goods, he will be liable to an action for so doing. The word *plegii* is in the plural number, yet in a distress *damage feasant*, if one be found sufficient, the Sheriff has discharged his duty;[b] in a distress for *rent*, if either surety be insufficient at the time they are taken, the Sheriff is liable.[b] In the one case, then, there is no obligation on the Sheriff to take a replevin bond with *two* sureties; in the other there is. Again, the pledges must be sufficient in law as well as in estate, for if they be poor in estate or insufficient in law, as within age, women covert, outlawed, persons politic or bodies corporate, the Sheriff must answer it. But if sufficient at the time they are taken, and become insufficient afterwards, the Sheriff is excused.[c] The degree of inquiry into the circumstances of sureties required of the Sheriff, has been a fertile source of litigation; the rule, however, is that he must exercise a reasonable discretion and caution in receiving them; whether he has done so or not is a question for the jury in each case, and the law cannot be laid down with more precision.[d]

In case of misbehaviour by the Sheriff or by his officer in relation to replevin, the Court will issue an attachment.[e] But for taking no bond or for taking one with insufficient pledges, the Court will not do so, for as the taking of the bond is directed by act of parliament and not by the Court, the neglect to do so is not looked upon as a contempt of Court. The proper remedy, therefore, for the party aggrieved is an action.[f] The Sheriff is not discharged by the defendant in replevin proceeding on the bond.[g] If the defendant in replevin elect to proceed on the statute 17 Car. 2, c. 7, he is not confined to his execution under that statute, he may sue the sureties or the Sheriff.[h]

**Time of commencing action.**

As to the proper time for commencing the action, there is a distinction when the bond is taken on a distress at common law, and when taken on a distress not at common law; for instance, where the distress is upon cattle *damage feasant*, no action can be brought until after a *rel. hab.*, and a return of *elongata* thereon.[i] But a bond under the 11 Geo. 2, c. 19, being conditioned for prosecuting the suit with effect, that is, success, is forfeited immediately on the plaintiff below being non-prossed.[k]

**Parties to action.**

The party entitled to an assignment of the bond is the proper person to bring the action, that is, the avowant; or where there is no avowant on the record, the person making conusance.[a]

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[a] *Perreau* v. *Bevan*, 5 B. & C. 284; *Plumer* v. *Brisco*, 11 Q. B. 46.

[b] 1 Wms. Saund. 195 *b*.

[c] Dalt. ch. 113.

[d] *Jeffery* v. *Bastard*, 4 Ad. & E. 829: and see *Plumer* v. *Brisco*, 11 Q. B. 54; *Scott* v. *Waithman*, 3 Stark. 168; 1 Wms. Saund. 195 *b*.

[e] Bac. Abr. Repl. (C.)

[f] *Rex* v. *Lewis*, 2 T. R. 617; 1 Wms. Saund. 195 *h*.

[g] 1 Wms. Saund. 195 *i*.

[h] *Perreau* v. *Bevan*, 5 B. & C. 284.

[i] *Hucker* v. *Gordon*, 1 C. & M. 67.

[k] *Perreau* v. *Beavan*, *suprà*.

Pleadings.

The declaration states the taking, replevy, plaint, judgment, the writ of *ret. hab.* and return of *elongata* thereon,[b] the Sheriff's duty to take bond with sufficient sureties, and defendant's neglect of duty.

The breach of duty or wrongful act here alleged, is the taking insufficient pledges which is put in issue by the plea of *not guilty.*[c]

Evidence.

The replevying if put in issue may be shown by the original precept to deliver and delivery. If the precept remain in the possession of the bailiff he should be served with a subpœna *duc. tec.*, but if it has been returned to the Sheriff, his attorney should be served with a notice to produce it, with a view to secondary evidence. The connection between the Sheriff and the bailiff must also be established by the evidence already laid down.[d] If the taking of the bond be in issue, the defendant should be served with a notice to produce it, if in his possession, and the service of such notice proved. When it is in evidence that the Sheriff has assigned the bond to the plaintiff, it is unnecessary to call the attesting witness; for as against the Sheriff, proof of the assignment by him to the plaintiff is sufficient evidence of its due execution.[e]

The sureties themselves are competent witnesses to prove whether they were sufficient or not.

The penalty of the bond is the limit of damages.[f] Within that limit the Sheriff is liable to the extent of the rent in arrear at the time of the distress, and the costs in the replevin suit when the value of the goods seized exceeds the amount of the rent due; but where the value of the goods is less than the rent in arrear, the damages are limited to that value and the costs. The costs of proceedings against the sureties may also be recorded against the Sheriff.[g]

## Section X.

### FOR A FALSE RETURN.

A RETURN is the Sheriff's answer or certificate (upon his oath of office), touching that which he is commanded to do by process delivered to him.[h] It is general or special. If general, it is usually indorsed on the writ itself. If special, it is commonly engrossed on a distinct schedule or piece of parchment, and annexed to the writ, with some such words as these indorsed on the writ—*the execution of this writ appears in a certain schedule hereunto annexed.*

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[a] *Page* v. *Eumer*, 1 B. & P. 378.

[b] *Hucker* v. *Gordon*, 3 Tyr. 107.

[c] In *Plumer* v. *Brisco*, 11 Q. B. 43, there were several other pleas, but *semble* not necessary.

[d] *Ante*, p. 228.

[e] *Scott* v. *Waithman*, 3 Stark. Rep. 168; *Plumer* v. *Brisco*, 11 Q. B. 52.

[f] 1 Wms. Saund. 195, *i.* n. (*p*).

[g] Ib.

[h] Dalt. ch. 36, 41; Vin. Abr. Sheriff Ret.

Form of, &c.

He ought to set his christian name and surname to every return, so that the Court may know of whom it took it, if need be.[a] It is not necessary that it be set *suâ propriâ manu;* it may, and is generally, done by the Under-sheriff. But all returns must be in the *name* of the High Sheriff.[b] Where there are two persons (as in Middlesex and in some counties corporate) the names of both must be set to it, for in law they constitute but one officer.[c] If a return be by coroners or elizors, all must sign it.[d] If, however, the writ be directed to coroners generally, and not by name, the return may be made by the survivor in case of death, for the survivor is coroner;[e] otherwise in the case of Sheriffs. If the Sheriff die, the Under-sheriff, before a new appointment, must return the writ in the name of the deceased Sheriff.[f] A new Sheriff may make a return of a writ directed to his predecessor in office, because it is directed to one as Sheriff, and not by this or that name.

Certainty of form.

As to the certainty required in returns.[g] As the object of a return is to inform the Court of the truth of the matter, precise certainty in form is not required.[h] If the whole command of the writ be shown to be performed in substance, it is sufficient, as *captus est* to a capias, *attachiatus est* to an attachment, without saying where, by whom, or how. So if it refer to the writ without repeating the words of it. Surplusage will not vitiate it. It must be in substance an answer to the whole writ; for instance, a panel with nine names or with fewer than the number required is defective.[i] It must be positive, not equivocal nor evasive. Thus, nulla bona, or non est investus *prout ei constare poterit* is uncertain, he should return nulla bona or non est inventus.[k]

It must not in general contradict his own former return, nor that of his predecessor in office; nor falsify the writ nor the record: nor be against the confession of the party.[l] Imperfect and *insufficient* returns are aided by the stat. of jeofails;[m] by appearance;[n] or they may be amended by the Court,[o] even after an attachment granted against the Sheriff for not bringing in the body.

The return was formerly deemed of such high regard, that as a general rule, no averment was admitted against it.[a] Now, however, in all cases it is regarded as evidence only—evidence not conclusive even upon the Sheriff himself.[b]

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[a] 12 Edw. 2, c. 5; Plowd. 68 a; *The Queen* v. *Dunn,* 2 Moody, C. C. 297; *Stroud* v. *Watts,* 3 D. & L. 799.

[b] Ib.; Vin. Abr. Sheriff (H.): and see Bac. Abr. *Sheriff,* Com. Dig. *Viscount,* Ret. (C.)

[c] *Ante,* p. 4.

[d] *Lambe* v. *Wiseman,* Hob. 88.

[e] Vin. Abr. Ret. (D.)

[f] 3 Geo. 1, c. 15, s. 8.

[g] Co. Litt. 368 a; 8 Co. 128 a; *Dovaston* v. *Payne,* 2 H. Bl. 530; *Wilson* v. *Law,* 2 Salk. R. 589; *Reynolds* v. *Barford,* 8 Sc. N. C. 238; 2 Roll. 401, c. 2.

[h] Dalt. ch. 36.

[i] Ib.

[k] Vin. Abr. Ret. (L.)

[l] Dalt. ch. 36.

[m] Hob. 83.

[n] Vin. Abr. Ret. (W.)

[o] Dalt. ch. 41; *Cavenagh* v. *Collett,* 4 B. & A. 279; *Rex* v. *Sheriff of Monmouth,* 1 Marsh. 344; *Rex* v. *Sheriff of Wilts,* 8 I. B. Moore, 518.

Imperfect or insufficient returns may be amended.[c]

If the Sheriff make no return the Court will grant an attachment against him Not returning a writ, without other default, is not a cause of *action*.[d]

Remedy. If the return of the Sheriff be false, he may be fined; or an action will lie against him.[e] An action is the proper mode of trying the truth or falsehood of a return. The Court will not do so on a motion to set aside the proceedings.[f]

The plaintiff does not waive his right of action for a false return by accepting money under it.[g] So an action lies against the Sheriff for a false return to a fi. fa., notwithstanding the plaintiff, before commencing the suit, has charged the original defendant in execution,[h] or brought an action on the judgment and obtained a second judgment therein.[i] An executor may bring an action for a false return to a *fi. fa.* in his testator's lifetime.[k]

Declaration. The declaration for a false return, for instance of a *nulla bona* to fi. fa., states the judgment, issuing of writ, indorsement, delivery to the defendant [the levy], and false return.[l]

Pleas. *Not guilty* operates as a denial of the wrongful act alleged, that is, of the fact of making the return complained of.[m] It would seem that the quality of the return—its truth or falsehood—is not put in issue by it. To raise that question the matter of inducement viz. that there were goods in the bailiwick whereof, &c., must be denied.[n] In such an action and under a plea denying the levy the Sheriff may go into any matter which tends to show that the money levied was not applicable to the plaintiff's writ, as that the judgment was fraudulent, that the money was exhausted by prior claims, that the execution debtor had lost his property by bankruptcy or the like.[o]

Evidence. It has already been pointed out how the matters of inducement, the writ, the delivery, levy and return are to be proved if in issue, and how the Sheriff is to be connected with his officer.[a] If the judgment be in issue it may be proved by an exemplification or by an examined copy. It cannot be objected at nisi prius that the judgment was not revived.[b] Where the Sheriff defends his return of *nulla bona*, on the ground that the debtor was the domestic servant of an ambassador, the execution creditor may show that the appointment was fraudulent.[c] He may show that the assignment of the goods before execution was fraudulent;[d] or that the judgment under which the Sheriff justifies applying the goods to other purposes than the plaintiff's writ was fraudulent,[e] indeed any circumstance which shows that in law the goods were liable to plaintiff's execution.[f] He cannot give in evidence, even in mitigation of damages, an inquisition held by him to inquire into the property of the goods.[g] As a general rule in this action, admissions, which would be evidence against the party, will be evidence against the Sheriff.[h]

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[a] See exceptions in Vin. Abr. Ret. (O.); 2 Roll. Abr. 462; Dalt. ch. 42; *Parker* v. *Mosse*, Cro. Eliz.

[b] *Gyfford* v. *Woodgate*, 11 East. 297; *Bridges* v. *Walford*, 6 M. & S. 42; *Jackson* v. *Hill*, 10 Ad. & E. 489; *Field* v. *Smith*, 2 M. & W. 388; *Scarfe* v. *Hallifax*, 7 ib. 291; *Standish* v. *Ross*, 3 Exch. 532; *Remmett* v. *Lawrence*, 15 Q. B. 1011.

[c] Dalt. ch. 41.

[d] *Morland* v. *Leigh*, 1 Stark. Rep. 388; *vide* 16 Q. B. 248.

[e] Com. Dig. Ret. (E. 2.); Dalt. ch. 36.

[f] *Barr* v. *Satchwell*, 2 Str. 813.

[g] *Holmes* v. *Clifton*, 10 Ad. & E. 675.

[h] *Wordall* v. *Smith*, 1 Camp. 332.

[i] *Pitcher* v. *King*, 9 Ad. & E. 288.

[k] *Williams* v. *Cary*, 12 Mod. 71.

[l] See *Lewis* v. *Alcock*, 3 M. & W. 188. Other counts for the officer's misconduct, as for not selling within a reasonable time after seizure, *Jacobs* v. *Humphrey*, 2 Cr. & M. 413; *Aireton* v. *Davis*, 9 Bing. 740; or for selling improperly, *Phillips* v. *Bacon*, 9 East, 298, may be added.

[m] Reg. Gen. Hil. T. 1853; *ante*, p. 282.

[n] *Wright* v. *Lainson*, 2 M. & W. 739; *Lewis* v. *Alcock*, 3 ib. 188; *Rowe* v. *Ames*, 6 ib. 747; *Wylie* v. *Birch*, 3 G. & D. 629.

[o] *Imray* v. *Magnay*, 11 M. & W. 267; *Christopherson* v. *Burton*, 3 Exch. 160; *Drewe* v. *Lainson*, 11 A. & E. 529; *Wintle* v. *Freeman*, ib. 539; *Shattock* v. *Carden*, 6 Exch. 728.

Damages. If there has been no actual loss, still, in the case of *final* process, the plaintiff is intitled to nominal damages [i]

## SECTION XI.

### ESCAPE.

Definition of. WHEN a person in lawful custody is, in fact, set at liberty, or gets away, or becomes, in contemplation of law, without a keeper, before discharge by due course of law, he has escaped.[k]

As a person may be restrained of his liberty for *crime* or for a *civil* matter, escape divides itself accordingly. In the one case, the Sheriff or officer is liable to the Crown, in the other the Sheriff is liable to the subject whose rights are injured by the breach of duty. Nothing but the act of God or the Queen's enemies will excuse it.[l] Excuse for.

Kinds of. The escape takes place with or without the assent of the keeper, it is, in other words, *voluntary* or *involuntary*. When voluntary nothing afterwards can purge it.[m] When involuntary it may be justified by recaption and the like.[n] What is not included under *voluntary* is deemed to be done *negligently*.

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[a] *Ante*, p. 228.

[b] *Habberton* v. *Wakefield*, 4 Camp. 58.

[c] *Delvalle* v. *Plomer*, 3 Camp. 47.

[d] *Dewey* v. *Bayntun*, 6 East, 257.

[e] *Warmoll* v. *Young*, 5 B. & C. 661.

[f] *Ante*, p. 180, 233.

[g] *Glossop* v. *Pole*, 3 M. & S. 175.

[h] *Williams* v. *Bridges*, 2 Stark. 42: and see *Coole* v. *Braham*, 3 Exch. 185.

[i] *Clifton* v. *Hooper*, 6 Q. B. 468: and see *Wylie* v. *Birch*, 3 G. & D. 630.

[k] Bac. Abr.; Vin. Abr.; Com. Dig. tit. *Escape*.

[l] *Alsept* v. *Eyles*, 2 H. Bl. 108; *Elliott* v. *Norfolk*, 4 T. R. 789.

[m] Ib.

[n] Ib.; & Cases Temp. Hardw. 310.

Recaption by creditor.

Whether it be of one kind or the other the *creditor* may, by the 8 & 9 W. 3, c. 27, s. 7, *retake* such prisoner by any new *capias* or *ca. sa.*, or he may sue forth any other kind of execution on the judgment, as if the body of such prisoner had never been taken in execution. In other words, the creditor has his option to proceed against the debtor or against the Sheriff.[a]

With assent of creditor, &c.

With the assent of the creditor the prisoner may be lawfully discharged; but assent after-given, it is said, will not make it an escape with the consent of the creditor;[b] if so, notwithstanding subsequent assent, he has his remedy against the Sheriff; or he may retake the party.[c]

The permission or assent of the gaoler is, as regards all civil remedies, the assent of the Sheriff.[d]

Escape from special bailiff.

The Sheriff is not liable for an escape from a special bailiff appointed by the plaintiff himself.[e]

Without bail-bond.

If one be arrested on a *capias* issued under 1 & 2 Vict. c. 110, and be permitted to go at large without a bail-bond or without making the required deposit, still if bail above be put in within the eight days, as no actual damage can arise, no action will lie against the Sheriff; on the other hand, if one taken in execution be at large for ever so short a time, as well before as after the return of the writ, it is an escape.[f] An attachment for nonpayment of money is deemed *mesne process* within this rule.[g]

Areta custodia.

When the prisoner is, in point of fact, a prisoner, and it is sought to charge the Sheriff with a constructive escape, as for having given his prisoner a greater degree of liberty than the law allows, by taking him beyond the boundary of the county, and the like, very great difficulties often arise. The general rule is, as above stated, that if a person taken in execution be at large for ever so short a time, as well before as after the return of the writ, and even if he be in company with and under the control of a follower of a Sheriff's officer, before he be taken to prison, it is an escape.[h] But this degree of strictness in the custody of a prisoner is comparatively relaxed when the Sheriff has his prisoner, as he may by *hab. corp.*, bankruptcy warrant, and the like, in a foreign jurisdiction, as in another county. The question in the latter case seems to be not whether the custody is more or less strict; but this, namely, has the Sheriff had more than a convenient time to obey the writ? If not there is no escape; if yes, then there is. What is a convenient time seems a question for the Court.[i] The Sheriff is not guilty of an escape by taking his prisoner to a lock-up house if that be a fit place.[a] If the officer take one arrested on a *capias* or on a *ca. sa.* out of his bailiwick, the Sheriff is chargeable for an escape.[b] If on a judgment against two, both be taken in execution and one escape, the Sheriff is liable though the other continue in prison.[c] The case of husband and wife stands on the same footing.[d] If the officer receive the amount indorsed on the writ, and before payment to the execution creditor release the debtor, there is an escape; for in the execution of this writ a payment to the Sheriff is no discharge of the debt as against the creditor.[e] If a keeper refuse to show prisoner to his creditor after one day's notice, such refusal is an escape.[f] If on the return of a *hab. corp. cum causâ*, the officer does not return all the causes, or returns them falsely, it is an escape in law.[g] If the outgoing Sheriff do not turn over and transfer, as required by the 3 & 4 Wm. 4, c. 99, a prisoner, it is an escape in law.[h]

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[a] *Ravenscroft* v. *Eyles*, 2 Wils. 294; Bac. Abr. *Escape.* (C.)

[b] See *Pope* v. *Jones*, 1 Wms. Saund. 35 *a*.

[c] *Scott* v. *Peacock*, 1 Salk. 271.

[d] *Wilkinson* v. *Salter*, Cas. Temp. Hardw. 310; *ante*, p. 26.

[e] *De Moranda* v. *Dunkin*, 4 T. R. 120.

[f] *Posterne* v. *Hanson*, 2 Wms. Saund. 61; *Jones* v. *Pope*, 1 Ib. 356, n. (*f*) *Randell* v. *Wheble*, 10 Ad. & E. 720.

[g] *Lewis* v. *Moreland*, 2 B. & A. 56.

[h] *Benton* v. *Sutton*, 1 Bos. & Pul. 24; cited in *Jones* v. *Pope*, 1 Wms. Saund. 35 *a*, n. (*d*).

[i] *Boyton's ca.* 3 Rep. 43; *Hawkins* v. *Plomer*, 2 Wms. Bl. 1048; *Nias* v. *Davis*, 4 C. B. 459: see also Dalt. App. ch. 7, s. 1.

One of several escaping.

Discharge before payment, &c.

If, while a person is lawfully in the Sheriff's custody at the suit of A., a ca. sa. be lodged against the prisoner at the suit of B. and he escape, A. or B. may sue;[i] for if the Sheriff have several writs against the same party and arrest him on one of them, he is deemed in custody under all, provided the first arrest be not illegal by the wrongful act of the Sheriff.[k]

If a Sheriff have in his custody several persons in execution and die, the Under-sheriff acting as *quasi* High-Sheriff under the 3 Geo. 1, c. 15, s. 8, and the successor are bound to take notice of all executions against any persons he finds in the gaol, for there is no person to transfer them or to give him notice.[l]

It is an escape though the process be *erroneous*.[m] But not if it be a *void* judgment or a *void* writ.[n] An escape can only be from a state of *lawful* detention. It cannot, for instance, be on a tortuous arrest, as in a wrong county, or the like.[o]

Erroneous process.

From a state of lawful custody.

If a prisoner in execution escape, he may be retaken as already stated, on an escape warrant,[p] or on a new *capias* or *ca. sa.*, or the judgment *creditor* may issue any other kind of execution on the judgment as if his debtor had never been taken at all,[q] or he may, at his option, proceed against the Sheriff for the escape. The *Sheriff* may retake him on fresh pursuit if the escape be a *negligent* one; if it be *voluntary* he cannot.[r]

Recapture by Sheriff.

If any keeper "take any sum of money, reward, or gratuity

Penal consequences.

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[a] *Houlditch* v. *Birch*, 4 Taunt. 610.

[b] See *Nias* v. *Davis*, *suprà*.

[c] Da't. App. ch. 7, s. 1.

[d] Ib.

[e] *Woods* v. *Finnis*, 7 Exch. 363, and cases; *ante*, p. 206.

[f] 8 & 9 Wm. 3, c. 27, s. 8.

[g] Vin. Abr. *Escape* (A.) 33.

[h] Ib. (A.) 12; Com. Dig. *Escape*, b. Q.; *ante*.

[i] *Barton* v. *Sutton*, 1 Bos. & Pul. 24; Bac. Abr. *Escape* (A.) 2.

[k] *Barrat* v. *Price*, 9 Bing. 566; *Robinson* v. *Yewens*, 5 M. & W. 152.

[l] *Westby's ca.* 3 Rep. 72, b.

[m] Vin. Abr. *Escape* (A.) 32.

[n] Ib. (F.) 20; *Jaques* v. *Cæsar*, 2 Wms. Saund. 101 *h*, *h*; *Shirley* v. *Wright*, 2 Salk. 700; *Lane* v. *Chapman*, 11 A. & E. 979.

[o] Vin. Abr. *Escape* (A.); *Contant* v. *Chapman*, 2 Q. B. 779.

[p] 1 Ann. st. 1, c. 6; 5 & 6 Ann. c. 9.

[q] 8 & 9 Wm. 3, c. 27, s. 7.

[r] See *Jones* v. *Pope*, 1 Wms. Saund. 35.

whatsoever, or security for the same, to procure, assist, or connive at or permit any such escape," he forfeits upon conviction 500*l.* and his office, and is ever after incapable of executing any such office.[a]

If one retaken on an escape warrant again escape, the Sheriff is liable.[b]

He is liable for the escape of one in his custody on a decree for the payment of a sum of money. So, by "The Bankrupt Law Consolidation Act, 1849," s. 274, "if any keeper of any prison, or any gaoler to whose custody any bankrupt or other person shall be duly committed, shall refuse to receive such bankrupt or other person, or shall suffer him to escape, every such keeper or gaoler shall forfeit 500*l.*"

**Punishment of keeper for escape of crown prisoners.**

*As to escape of Crown prisoners* :—"It seems to be generally agreed (says *Hawkins*),[c] that a *voluntary* escape amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody; whether it be treason, felony, or trespass, and whether the person escaping was actually committed to some gaol, or under arrest only, and not committed; and whether he were attainted, or only accused of such crime and not then indicted nor appealed." An officer making fresh pursuit after such a prisoner may retake him at any time after, whether he find him in the same or in a different county, and *semble* he may do so, though it be not on fresh pursuit. *Semble* also after a *voluntary* as well after a *negligent* escape, a retaking before bill found relieves him.[d] "It seems clear (adds Hawkins)[e] that every indictment for an escape, whether negligent or voluntary, must expressly show that the party was actually in the defendant's custody for a crime, action or commitment for it, and that it is not sufficient to say that he was in the defendant's custody and charged with such a crime, for that a person in custody may be so charged, and yet not be in custody by reason of such charge. And it seems also, that every such indictment must expressly show that the prisoner went at large, which is most properly expressed by the words *evasit ad largum*. Also, it seems necessary to show the time when the offence was committed, for which the party was in custody, not only that it may appear that it was prior to the escape, but also that it was subsequent to the last general pardon. Also, it seems clear, that every indictment for a voluntary escape must allege that the defendant *felonicè et voluntariè A. B. ad largum ire permisit*, and must also show the species of the crime for which the party was imprisoned; for it is not sufficient to say in general that he was in custody for felony, &c., for that no one can be punished in this degree, but as involved in the guilt of the crime for which the party was in his custody, and therefore the particular crime must be set forth, that it may appear that the principal is attainted for the very same crime, if it were felony, or that it was in truth committed if high treason. But it seems questionable whether such certainty as to the nature of the crime be necessary in an indictment for a negligent escape, for that it is not material in this case, whether the person who escaped were guilty or not."

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[a] 8 & 9 Wm. 3, c. 27, s. 4.

[b] 1 Ann. st. 1, c. 6, s. 2; 5 & 6 Ann. c. 9.

[c] P. C. b. 2, ch. 19.

[d] *The King* v. *Fell*, 12 Mod. 227.

[e] P. C. b. 2, ch. 19, s. 14.

Party to sue.

The plaintiff in the original action is the proper party to sue for an escape. The Sheriff must be defendant, except for a *voluntary* escape, when the officer *may* be charged as a personal wrong-doer. Where the escape was on a *capias utlagatum*, and an administrator sued *qui tam*, it was held good.[a] When there are two Sheriffs who suffer an escape, and one dies, the action lies against the survivor. If pending the action one die, the action survives.[b]

By 3 Geo. 1, c. 15, s. 8, in case of the death of the Sheriff, the Under-sheriff is liable for an escape during the time he acts under the statute.

Neither the heir nor the executor of the Sheriff can be sued for an escape before his death.[c] But in a judgment obtained against the testator for an escape an action lies.[d] An executor may sue for an escape in his testator's lifetime or in his own time.[e] An administrator may sue in his own right on a judgment obtained by him as administrator.[f]

Remedy.

The remedy against the Sheriff is by action or attachment. When the Common Law Procedure Act (15 & 16 Vict. c. 76) passed, the old common law form of *case* was the only form of action against the Sheriff on mesne or final process; the statutory one of *debt* having been abolished by the 5 & 6 Vict. c. 98, s. 31.[g]

Pleadings.

The declaration for an escape on *mesne process* states the debt, summons, order, capias, indorsement for bail, the delivery to the Sheriff, the arrest, breach of duty and special damage. When the prisoner has escaped from custody under an attachment for the nonperformance of an award, or for nonpayment of costs under a decree in equity, proper counts can easily be framed.[h] We often find other counts for not arresting the debtor when the Sheriff had an opportunity, for not assigning the bail-bond, and the like.[i] We also find the word *voluntarily*, but this is superfluous. The declaration for an escape on *final process* states the judgment, the writ, indorsement, delivery, caption and escape. Additional counts may also be added if warranted by the facts, always keeping in mind that counts *ex contractu* and *ex delicto* may now be joined in the same declaration.

The plea of not guilty operates as a denial of the neglect or default of the Sheriff or his officers, but not of the debt, judgment or preliminary proceedings.[k] All matter which excuses or justifies the Sheriff must be specially pleaded. A re-taking on fresh pursuit;[a] a voluntary return before action brought; that the prisoner's return was fraudulently prevented by the plaintiff; that the escape was by the fraud and covin of the party really interested in the judgment; that the discharge was by virtue of an order of the Insolvent Debtors Court or Bankruptcy Protection Order;[b] an order to discharge under the hand of the attorney in the cause;[c] that the plaintiff himself had authorised his discharge; the Statute of Limitations and the like.[d] If the declaration allege, as it usually does, that the escape was voluntary, re-capture on fresh pursuit is a good plea, without denying that it was voluntary, as plaintiff may show in his replication that it was so if he meant to rely on that fact.[e] He cannot as a general rule avail himself of any error in the process below, of which the defendant below might have availed himself.[f]

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[a] *Barrett's ca.* Cro. Jac. 657.

[b] Cro. Eliz. 625.

[c] 2 Wms. Exors. 1471.

[d] See *Bonafous* v. *Walker*, 2 T. R. 130; *Jones* v. *Pope*, 1 Wms. Saund. 35.

[e] See *Wheatley* v. *Lane*, 1 Wms. Saund. 216 a.

[f] *Bonafous* v. *Walker*, 2 T. R. 126.

[g] See *Jones* v. *Pope*, 1 Wms. Saund. 38.

[h] *Brazier* v. *Jones*, 8 B. & C. 124; *Blower* v. *Hollis*, 1 C. & M. 393.

[i] 2 Wms. Saund. 155, n. (c).

[k] Reg. Gen. Hil. T. 1853, 1 E. & B. App.

Evidence.

How the matters of inducement, if in issue, are to be established at the trial and how the Sheriff is to be connected with the acts of the officer has been already explained.[g] The escape may be proved by showing directly that the party was in custody, or by the Sheriff's return of *cepi corpus*, and that he was afterwards at large. The plaintiff is at liberty to give in evidence a negligent escape, under a declaration alleging it to be *voluntary*.[h]

In an action against the Sheriff for an escape on mesne process an admission by the defendant in the former action as to his liability, is evidence against the Sheriff. Indeed, as a general rule, whatever evidence would be sufficient to charge the original party in a suit against him, will also be admissible as evidence against the Sheriff.[i] The indorsement of *non est inventus* or of *cepi corpus* on the writ is sufficient evidence of its delivery to him.[k] The return of a *cepi corpus* proves the arrest. The relation of the officer and the Sheriff, the escape, &c., is proved by other evidence.

Damages.

If the escape be on *mesne process*, plaintiff must prove that he has sustained actual damage, or been delayed in his suit thereby, otherwise he will fail altogether. The Sheriff is not liable for the whole debt, only for such damages as the plaintiff can show he has sustained. If the escape be on *final process*, plaintiff will recover such damages as the jury may give; he is, however, entitled to nominal damages under any circumstances.[l]

The discretion of the Court in setting aside an attachment against the Sheriff for the escape of a prisoner taken on a *ca. sa.* is to be governed by the principle laid down in an action for damages under the 5 & 6 Vict. c. 98, s. 31. In other words the true measure of damages is not necessarily the whole debt but the actual loss, and if necessary an action will be directed to ascertain the amount of such damages.[a]

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[a] See *Bonafous* v. *Walker*, 2 T. R. 126, and cases cited.

[b] *Norton* v. *Walker*, 3 Exch. 488.

[c] *Ante*, p. 206.

[d] 1 Wms. Saund. 35.

[e] Ib.

[f] 2 Wms. Saund. 101 *h*, *h*.

[g] *Ante*, p. 228.

[h] Wms. Saund. 37.

[i] *Williams* v. *Bridges*, 2 Stark. 42 see *Coole* v. *Braham*, 3 Exch. 183.

[k] *Ante*, p. 254, n. (m).

[l] *Williams* v. *Mostyn*, 4 M. & W. 145; *Clifton* v. *Hooper*, 6 Q. B. 476.

## SECTION XII.

### EXTORTION.

Fees.

To understand rightly the nature of extortion, it is of importance to know beforehand what fees are allowed by law and what not.

Now, fees are the perquisites allowed by officers in the administration of justice as a recompense for their labour and trouble; given and fixed either by act of parliament, by the Judges of the Superior Courts, or by other persons named by the Legislature for that purpose.[b] At common law an officer concerned in the administration of justice is entitled to no fee for doing his duty,[c] but as the common law gave no fees to Sheriffs, they became backward in executing writs by reason of the great danger in taking desperate men as well as in detaining them for fear of escapes; whereupon parliament thought fit to grant them fees in the reign of Queen Elizabeth, which they have had until this day.[d]

Until the reign of her present Majesty (1 Vict. c. 55) the fees were ascertained and regulated by the following statutes; on *mesne process*, by the 23 Hen. 6, c. 9, and 32 Geo. 2, c. 28, s. 12; on *final process* against the debtor's goods, by 28 Eliz. c. 4, and 43 Geo. 3, c. 46; against his *lands*, by elegit and hab. fac. poss. by 3 Geo. 1, c. 15, and 8 Geo. 1, c. 25; on extents, crown debts and liberates, by 3 Geo. 1, c. 15, and 8 Geo. 1, c. 25; and as to poundage on *ca. sa.* by 3 Geo. 1, c. 15, s. 17. The statutes of the present reign are 1 Vict. c. 55 (passed to *increase* and fix the remuneration to be paid to the Sheriff or his officers, according to the discretion of the Judges);[e] the 5 & 6 Vict. c. 98, s. 31, taking away the right of *poundage* on a *ca. sa.*; and "The Common Law Procedure Act, 1852," enabling either party whether plaintiff or defendant, and whether the execution be against the goods or person of the debtor, to levy the fees and expenses of execution.[f]

1 Vict. c. 55.

The following is the statute of 1 Vict. c. 55 (15th July, 1837), intituled "An Act for better regulating the Fees payable to the Sheriffs upon the execution of Civil Process."

"Whereas it is expedient to amend the laws relating to the fees payable to Sheriffs, Under-sheriffs, Deputy-sheriffs, Sheriffs' agents, bailiffs, and others the officers or ministers of Sheriffs in England and Wales, and to give the Courts of Record at Westminster Hall a due control over such fees; and also to provide a summary remedy against such officers and others as shall extort or receive other or greater fees than by law they shall be entitled to: and whereas divers enactments touching the said officers, contained in certain ancient statutes, have become inconvenient, and ought to be repealed:" Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of an act passed in the forty-second year of his late Majesty King Edward the Third, intituled *Estreats shall be showed to the Party indebted, and that which is paid shall be totted: no Sheriff, &c. shall continue in Office above a year*, as relates to the time during which Under-sheriffs and Sheriffs' clerks may abide in their respective offices; and also an act passed in the first year of the reign of his late Majesty King Henry the Fifth, intituled *Sheriffs' Bailiffs shall not be in the same Office in Three Years after: Sheriffs' Officers shall not be Attornies;* and also so much of an act passed in the twenty-third year of the reign of his late Majesty King Henry the Sixth, intituled *No Sheriff shall let to farm his county or any bailiwick: the Sheriffs' and Bailiffs' Fees and Duties in many Cases*, as relates to the fees to be taken by Sheriffs, Under-sheriffs, Sheriffs' clerks, and other officers and ministers of Sheriffs, be and the same are hereby repealed.

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[a] *Arden* v. *Goodacre*, 11 C. B. 367.

[b] See Hawk. P. L. C. b. 1, ch. 27.

[c] 2 Inst. 176-210; *Walden* v. *Vesey*, Latch. Rep. 15; *Dew* v. *Parsons*, 2 B. & A. 566. As to recovering a *quantum meruit* for his trouble, see Moor. 808.

[d] Ibid.

[e] *Pilkington* v. *Cooke*, 4 D. & L. 855; *Wrightup* v. *Greenacre*, 10 Q. B. 1.

[f] 15 & 16 Vict. c. 76, s. 123; and Reg. Gen. Hil. T. 16 Vict.

Part of 42 Edw. 3, c. 9; the act 1 Hen. 5, c. 4; and part of 23 Hen. 6, c. 9, repealed.

Fees to be allowed by taxing officer of Courts at Westminster.

2. And be it enacted, that from and after the passing of this act it shall be lawful for Sheriffs, or their officers concerned in the execution of process directed to Sheriffs, to demand, take and receive such fees, and no more, as shall from time to time be allowed by any officer of the several courts of law at Westminster charged with the duty of taxing costs in such Courts, under the sanction and authority of the judges of the said Courts respectively.[a]

To prevent officers taking fees not allowed or greater fees than are allowed; and other persons from taking any fees.

3. And be it enacted, that any Sheriff, officer, or minister acting in the execution of process directed to any Sheriff or Sheriffs, or engaged or concerned therein, who shall extort, demand, take, accept or receive from any person or persons any fee or fees, gratuity or reward not allowed as aforesaid, or greater in amount than as allowed as aforesaid, such Sheriff or other his officer or minister, upon complaint thereof made against him to any of the said Courts, and on proof being made thereof upon oath, either by the examination of witnesses *vivâ voce*, or on affidavits, or on interrogatories, to the satisfaction of the Court to which the said complaint shall be made, that such Sheriff, officer or minister, as the case may be, hath offended therein as aforesaid, then and in such case every such Sheriff, officer or minister, as the case may be, shall be adjudged guilty of a contempt of such Court, and punished by such Court accordingly; and if any person, not being such officer or minister as aforesaid, shall assume or pretend to act as such, and shall extort, demand, take, accept or receive any fee or fees, gratuity or reward under colour or pretext of such office, he shall, on like complaint and proof, be in that respect dealt with by the Court in like manner.

Court may award costs.

4. And be it enacted, that in all cases of summary complaints as aforesaid, the Court before which such complaint shall be preferred, may, at its discretion, award the costs of or occasioned by such complaint to be paid by either party to the other; such costs to be taxed by the master of such Court: provided always, that no such complaint shall be entertained unless made before the last day of term next following the act whereof complaint is made.

Fees to the Sheriffs of Lancashire and Durham.

5. And be it enacted, that from and after the passing of this act the Sheriffs of Lancashire and Durham, and their officers, shall have and be entitled to the like fees, and no more, upon process issuing out of the Court of Common Pleas at Lancaster and out of the Court of Pleas at Durham respectively as from time to time shall be allowed under the authority of this act to Sheriffs upon process issuing from the Superior Courts at Westminster; and that the said Court of Common Pleas at Lancaster and Court of Pleas at Durham respectively, or any judge thereof respectively, being also judge of one of the Superior Courts at Westminster, shall

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[a] This does not expressly, nor by implication, repeal the 28 Eliz. c. 4. It enables the judges to *increase* the fees: see *Wrightup* v. *Greenacre*, 10 Q. B. 1 and *Pilkington* v. *Cooke*, 4 D. & L. 355.

have the same powers in every particular, with respect to offences against this act upon process issuing out of the said Court of Common Pleas at Lancaster and Court of Pleas at Durham respectively, as are hereinbefore given to the Courts at Westminster respectively in respect of process issuing from those Courts.[a]

6. And be it enacted, that this act may be amended, altered or repealed by any act to be passed in the present session of parliament.

And by virtue of the power granted by the second section, the judges, on the 20th day of December, A.D. 1837, sanctioned and authorized the following

## TABLE OF FEES.[b]

*For every Warrant which shall be granted by the Sheriff to his Officer, upon any Writ or Process:—*

| | £ | s. | d. |
|---|---|---|---|
| In London and Middlesex | 0 | 2 | 6 |
| And on crown and outlawry process, an additional | 0 | 2 | 6 |
| In all other counties, where the most distant part of the county shall not exceed 100 miles from London | 0 | 5 | 0 |
| Not exceeding 200 miles | 0 | 6 | 0 |
| Exceeding 200 miles | 0 | 7 | 0 |
| For an arrest in London | 0 | 10 | 6 |
| In Middlesex, not exceeding a mile from the General Post Office | 0 | 10 | 6 |
| Not exceeding seven miles from same place | 1 | 1 | 0 |
| In other counties, not exceeding a mile from officer's residence | 0 | 10 | 6 |
| Not exceeding seven miles | 1 | 1 | 0 |
| Exceeding seven miles | 1 | 11 | 6 |
| For conveying the defendant to gaol from the place of arrest, *per mile* | 0 | 1 | 0 |
| For an undertaking to give a bail-bond | 0 | 10 | 6 |

### FOR A BAIL-BOND.

| | | £ | s. | d. |
|---|---|---|---|---|
| If the debt shall not exceed | £50 | 0 | 10 | 6 |
| Do. | 100 | 1 | 1 | 0 |
| Do. | 150 | 1 | 11 | 6 |
| Do. | 300 | 2 | 2 | 0 |
| Do. | 400 | 3 | 3 | 0 |
| Do. | 500 | 4 | 4 | 0 |
| If it shall exceed | 500 | 5 | 5 | 0 |
| For receiving money under the statute upon deposit for arrest, and paying the same into Court, if in London or Middlesex | | 0 | 6 | 8 |
| If in any other county | | 0 | 10 | 0 |

### FOR FILING THE BAIL-BOND.

| | £ | s. | d. |
|---|---|---|---|
| If the arrest be made in London or Middlesex | 0 | 2 | 0 |
| If in any other county | 0 | 4 | 0 |

### ASSIGNMENT OF BAIL OR OTHER BOND.

| | £ | s. | d. |
|---|---|---|---|
| If in London or Middlesex | 0 | 5 | 0 |
| If in any other county, including postage | 0 | 7 | 6 |
| For the return to any writ of habeas corpus, if one action | 0 | 12 | 0 |

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[a] See also 15 & 16 Vict. c. 76, ss. 229-234.

[b] As regards these fees, and the effect of the 1 Vict. c. 55, upon the previous statutes, see *ante*, p. 184. By Reg. Gen. Mich. T. 10 Vict. (November 16, 1846), it was ordered "that so much of the table of fees, signed by the judges and ordered to be enrolled on the 20th December, 1837, purporting to be made pursuant to the statute 1 Vict. c. 55, *as relates to process at the suit of the Crown*, be annulled;" 9 Q. B. 599.

| | | £ | s. | d. |
|---|---|---|---|---|
| And for each action after the first | | 0 | 2 | 6 |
| For the Bailiff to conduct prisoner to gaol | *per diem* | 0 | 10 | 0 |
| And travelling expenses | *per mile* | 0 | 1 | 0 |
| For searching offices for detainers[a] | | 0 | 1 | 0 |
| Bailiff's messenger for that purpose[a] | | 0 | 2 | 6 |
| To the bailiffs, for executing warrants on extent, capias utlagatum, levari facias, fieri facias, ca. sa., ne exeat, attachment, elegit, writ of possession, forfeited recognizance, process from Pipe Office, and other like matters, for each, if the distance from the Sheriff's office or the bailiff's residence do not exceed five miles | | 1 | 1 | 0 |
| If beyond that distance | *per mile* | 0 | 0 | 6 |
| On distringas in London | | 0 | 5 | 0 |
| In Middlesex, not exceeding five miles from General Post Office | | 0 | 5 | 0 |
| Exceeding five miles | | 0 | 10 | 0 |
| In other counties, not exceeding five miles from officer's residence | | 0 | 5 | 0 |
| Exceeding five miles | | 0 | 10 | 0 |
| For each man left in possession, when absolutely necessary,[b] | | | | |
| If boarded | *per diem* | 0 | 3 | 6 |
| If not boarded | *per diem* | 0 | 5 | 0 |
| For every sale by auction, notwithstanding the defendant should become bankrupt or insolvent, where the property sold does not produce more than 300*l.* 5 per cent.—480*l.* 4 per cent.—500*l.* 3 per cent., and where it exceeds 500*l.* 2½ per cent. | | | | |
| For the certificate of sale, to save auction duty | | 0 | 2 | 6 |
| Bond of indemnity, besides stamps | | 1 | 10 | 0 |
| Certificate of execution having issued for record | | 0 | 5 | 0 |

### ON WRITS OF TRIAL AND INQUIRY.

| | | | | |
|---|---|---|---|---|
| For a deputation | | 1 | 1 | 0 |
| On lodging writ for entering cause, and warrant for summoning jury, which fee shall be forfeited in case of countermand of trial | | 0 | 4 | 0 |

### ON TRIAL OR INQUISITION.

| | | | | |
|---|---|---|---|---|
| Sheriff for presiding | | 1 | 1 | 0 |
| Bailiff for summoning jury, and attendance in Court | | 0 | 4 | 0 |
| And if not held at the office of the Under-sheriff, | | | | |
| For hire of room, if actually paid, not exceeding | | 0 | 10 | 0 |
| For travelling expenses of Under-sheriff from his office to place where trial or inquisition held[c] | *per mile* | 0 | 1 | 0 |
| To the bailiff, from his residence[c] | *per mile* | 0 | 0 | 6 |
| In all cases in which it shall appear to the master that a saving of expense has accrued to the parties by reason of a writ of trial having been executed by deputation, the fee for such deputation shall be allowed. | | | | |
| On writs of extent, elegit, capias utlagatum, and others of the like nature; for summoning the jury, use of room, presiding at the inquisition, &c. | | 2 | 2 | 0 |
| Jury | | 0 | 12 | 0 |
| For travelling expenses of Under-sheriff from his office to the place of inquisition | *per mile* | 0 | 1 | 0 |
| For drawing and engrossing the inquisition | *per folio* | 0 | 1 | 6 |
| For a summons for the attendance of a witness | | 0 | 5 | 0 |

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[a] These are not payable on a levy under a *fi. fa.*, *Masters* v. *Lowther*, 11 C. B. 948.

[b] See *Masters* v. *Lowther*, *suprà.*

[c] See next page.

### IN REPLEVIN.

Bond (*see* next page).

| | £ | *s.* | *d.* |
|---|---|---|---|
| Precept to bailiff | 0 | 2 | 6 |
| Notice for service on defendant | 0 | 2 | 6 |
| Broker, where the sum demanded and due shall exceed 20*l.* and shall not exceed 50*l.* for appraisement and affidavit of value | 0 | 10 | 6 |
| Where it shall exceed 50*l.* | 1 | 1 | 0 |
| And his travelling expenses from his residence to the place where the goods are . . . *per mile* | 0 | 0 | 6 |
| Bailiff for summoning parties and delivering goods to tenant | 1 | 1 | 0 |
| And his travelling expenses same as broker | | | |
| For the warrant, record, and return of a re. fa. lo., accedas ad curiam, pone, or writ of false judgment | 0 | 16 | 6 |
| For writ of retorno habendo | 0 | 4 | 6 |
| For each summons on a writ of sci. fa., or for the service of writ of capias where no arrest | 0 | 5 | 0 |
| And mileage . . . *per mile* | 0 | 1 | 0 |
| For recording each demand or proclamation under writs of outlawry | 0 | 2 | 0 |
| For bailiff for making each demand or proclamation on writs of outlawry in London and Middlesex | 0 | 2 | 6 |
| In other counties | 0 | 5 | 0 |
| And travelling expenses, if the distance shall exceed five miles, then for every mile beyond that distance | 0 | 0 | 6 |
| For any supersedeas, writ of error, order, liberate or discharge to any writ or process, or for the release of any defendant in custody (unless in the prison of the county), or of goods taken in execution[a] | 0 | 4 | 6 |
| For the return of any writ or process, and filing same, exclusive of the fee paid on filing | 0 | 1 | 0 |

### JURY PROCESS.

| | £ | *s.* | *d.* |
|---|---|---|---|
| For return to common venire | 0 | 3 | 6 |
| The like to special | 0 | 5 | 0 |
| The like on distringas or habeas corpus for common jury | 0 | 12 | 0 |
| The like for special jury | 0 | 14 | 0 |
| The like with a view | 1 | 0 | 0 |
| The like to a traverse venire | 0 | 14 | 6 |
| For attendance naming special jury | 2 | 2 | 0 |
| Twenty-four warrants to summon special jury | 1 | 4 | 0 |
| For bailiff for summoning each special juror | 0 | 2 | 0 |
| Sheriff attending in Court | 1 | 1 | 0 |
| For attending a view, the fees as allowed by Rule of Court, Trinity Term, 7 Geo. 4, 1826. | | | |
| For any Duty not herein provided for, such sum as one of the Masters of the Courts of Queen's Bench or Exchequer, or one of the Prothonotaries of the Court of Common Pleas, may upon special application allow. | | | |

## ADDENDA.

### BOND IN REPLEVIN.

| | £ | *s.* | *d.* |
|---|---|---|---|
| Instead of the allowance of the fees upon the same scale as the bail-bond, the fee of 1*l.* 1*s.* only is allowed, whatever be the amount, if above 20*l.* | 1 | 1 | 0 |

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[a] This is only payable when the goods are released without an actual levy, *Masters* v. *Lowther*, 11 C. B. 948, 951.

FEES ON WRITS OF TRIAL AND INQUISITION.

The travelling expenses of the Under-sheriff from his office, and of the Bailiff from his residence to the place where the trial or inquisition is held, are to be apportioned rateably to the parties, if more than one trial or inquisition be held at the same time and place.

*Signed by all the Judges, and ordered to be enrolled.*

Extortion, what.

Having thus ascertained what fees are by law allowed to Sheriffs in the execution of civil process, &c., it becomes more easy to comprehend and define the offence of extortion. In a large sense it denotes any oppression under colour of right. But it is usually, as here, applied to that abuse of public justice, which consists in the unlawful taking of money or valuable thing by any officer *colore officii* from another when none at all is due, or not so much is due, or before it is due—" *extortio est crimen quando quis colore officii extorquet quod non est debitum vel quod suprà debitum vel ante tempus quod est debitum.*[a] The difference between *bribery* and *extortion* seems to be this—the former offence consists in the offering a present, or receiving one when offered; the latter in demanding one *colore officii.* If an Under-sheriff, therefore, refuse to execute a ca. sa., fi. fa., &c., unless his fees be paid, the Sheriff will be liable in damages for not doing his duty; or after taking the fees (because taken before due) the Under-sheriff may be indicted for extortion.[b] So likewise it is extortion to take a bond for his fee before execution.[c] To admit a prisoner to bail;[d] to take anything for sparing, not warning, or not returning him to serve as a juryman or otherwise at the assizes, sessions of the peace, or at any other Court; to take money or other reward not to arrest or attach, or for any other omission of duty, is extortion. So if the Sheriff or gaoler detain one in prison, after being duly discharged, except for lawful fee, it is extortion; as if he detain him for meat, drink or the like.

Remedies for.

The present remedies are—

1. By indictment.
2. By attachment.
3. By action on the 32 Geo. 2, c. 28, or 28 Eliz. c. 4, as the case may be.[e]
4. By summary application to the Court under 1 Vict. c. 55.

Declaration.

The declaration, be it on mesne or final process, proceeds as explained already in actions for escape or false return, differing only in the statement of the breach of duty.[f] A second count for money had and received is generally added.

Plea.

If it be for the penalty, *nil debet* may be pleaded, and the matters of inducement as well as the wrongful act alleged may be given in evidence under it.[a] In other actions the matters of inducement must be denied, if in dispute.

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[a] See Hawk. P. C. b. 1, ch. 27; Dalt. ch. 119.

[b] *Hescott's ca.*, 1 Salk. 330.

[c] Hut. 53; *Ex parte Evans*, 2 Bos. & Pul. 88.

[d] *Stotesbury* v. *Smith*, 2 Burr. 924.

[e] See *Pilkington* v. *Cooke*, 16 M. & W. 615; *Wrightup* v. *Greenacre*, 10 Q. B. 1; *Holmes* v. *Sparkes*, 12 C. B. 250.

[f] See *Ashby* v. *Harris*, 2 M. & W. 673; *Usher* v. *Walters*, 3 G. & D. 600; *Berton* v. *Lawrence*, 5 Exch. 816; *Holmes* v. *Sparkes*, 12 C. B. 250.

Evidence.

To prove the wrongful act alleged, inasmuch as the above statutes are all public acts, and as the table of fees promulgated by the judges in pursuance of the 1 Vict. c. 55, also has the force of a public act, and therefore to be equally judicially noticed, it would seem unnecessary to give any evidence as to the amount of fees allowed by law.[b] If so, it is enough to show by his return or otherwise how much he was to levy and how much the officer did actually receive.

Damages.

The plaintiff may recover the penalty, treble *damages*,[c] or the sum extorted, as the case may be. Formerly also he had in some cases treble *costs*, but they are no longer allowed.[d]

Motion to the Court.

Complaint may be made to the Court upon oath either by the examination of witnesses *vivâ voce*, or on affidavits, or on interrogatories, and the party offending (if the complaint be made *in due time*, that is, before the last day of the term next following the act whereof complaint is made) will be adjudged guilty of a contempt of Court, and punished accordingly. By one and the same rule the Sheriff may be called upon to refund the excess, and the officer to show cause why he should not be attached for the contempt.[e]

When the excess complained of was charging for remaining in possession a longer time than was necessary, and for more men than were necessary to keep possession, and the affidavits were contradictory, the Court referred the matter to the master for his report.[f]

For extortion in the execution of a *fi. fa.* the proper title of an affidavit is in the cause.[g]

## Section XIII.

### FOR NEGLECT AS RETURNING OFFICER AT ELECTIONS.

The 11 & 12 Vict. c. 98, s. 103, enacts, "That if any Sheriff or other returning officer shall *wilfully* delay, neglect or refuse duly to return any person who ought to be returned to serve in Parliament, for any county, city, borough, district of burghs, port, or place within Great Britain or Ireland, such person may, *in case it have been determined by a select Committee appointed in the manner hereinbefore directed that such person was entitled to have been returned*, sue the Sheriff or other officer having so wilfully delayed, neglected, or refused duly to make such return at his election, in any of Her Majesty's Courts of Record at Westminster, or

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[a] *Ante*, p. 72.

[b] *Plevin* v. *Prince*, 10 Ad. & E. 498, overruling *Martin* v. *Slade*, 2 N. R. 59; and *semble Martin* v. *Bell*, 6 M. & S. 220.

[c] *Woodgate* v. *Knatchbull*, 2 T.R. 148.

[d] 5 & 6 Vict. c. 97.

[e] *Blake* v. *Newburn*, 5 D. & L. 602.

[f] Ibid.

[g] *Masters* v. *Lowther*, 11 C. B. 948.

Dublin, or in the Court of Session in Scotland, and shall recover double the damages he has sustained by reason thereof, together with full costs of suit, *provided such action be commenced within one year after the commission of the act* on which it is grounded; *or within six months after the conclusion of any proceedings in the House of Commons relating to such election.*" A returning officer may also be sued for refusing to receive a vote.[a]

## SECTION XIV.

### ACTIONS *EX CONTRACTU.*

Nature of.

THESE actions are based upon actual contracts, or contracts in law; the latter are what we have now chiefly to deal with.

Money had and received.

As soon as the money is received by the Sheriff, *e.g.* under a *fi. fa.*, he is presently, by act of law, debtor to the plaintiff. In the language of the older books, when the money is levied by the Sheriff, so as the action ceases against the defendant, the same is by law transferred to the Sheriff, having both the judgment to make it a debt, and the levy to make him answerable.[b] There seems formerly to have been an impression that this contract was not transferred to the Sheriff before the return of the writ, but after solemn argument it was decided otherwise.[c] The usual course is, where the party has not precluded himself, to rule the Sheriff to return the writ; and, upon a return that he has seized and sold and has the money ready, to proceed for the fruits of the execution, by motion to the Court,[d] action of account,[e] by action on the return, or for money had and received.[f] If he suffer goods seized under an execution, and returned by him of such a value, to be rescued out of his hands, a *scire facias* lies to have execution against him of the money according to the value returned.[g]

A mere seizure will not charge the Sheriff in an action for money had and received; for, until *sale*, the execution creditor has no interest in either the goods or money; without which this action will never lie. By *sale*, or payment of the money, the original debt is extinguished, and the debt is transferred to the Sheriff.[h] So, where he receives payment of or recovers by action the amount of any security for money seized under a *fi. fa.* and refuses to pay it over, money had and received will lie against him.[a] Where he seizes under a *fi. fa.*, and the owner of the goods contends that the possession is illegal, and pays money to avert the evil and inconvenience of a sale, the money so paid may be recovered back in an action for money had and received; if the claim turns out to have been unfounded.[b] Money paid under a *threat* to seize and sell would have the same effect.[c] The same principle will equally apply to money extorted by duress, or by a threat of duress of the person.[d] But a voluntary payment of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity (as to redeem or preserve his person or goods), is not the subject of an action for money had and received.[e] An action for money had and received cannot be maintained by a landlord to recover the amount of a year's rent against the Sheriff who has sold his tenant's goods under an execution. The landlord's remedy is on the stat. of 8 Ann. c. 14, for removing the goods before the year's rent was paid, or by motion to the Court.[f] In order to maintain money had and received, either the money or the goods (the proceeds of which are claimed by the plaintiff) must originally, or at the time of the action brought, have belonged to the plaintiff. Upon this principle it was held, that if the Sheriff, after having seized goods under a *fi. fa.* at the suit of A., sell them, though irregularly, under another process at the suit of and for the benefit of B., this action cannot be supported by A. against the Sheriff.[g] Again, the Sheriff cannot be fixed with the debt by the laches of the plaintiff. Where the Sheriff in *Mich.* term returned to a writ of *fi. fa.* "goods in hand for want of buyers, value unknown," and no further steps were taken until *Trin.* term following, in the meantime, the goods were seized under an extent by the Crown, it was held, that as the delay was permitted by the plaintiff he could not afterwards fix the Sheriff with the payment of the debt.[h]

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[a] *Pryce* v. *Belcher*, 3 C. B. 58.

[b] *Speake* v. *Richards*, Hob. 206; *Mildmay* v. *Smith*, 2 Wms. Saund. 344.

[c] *Speake* v. *Richards*, *suprà*; *Perkinson* v. *Gilford*, Cro. Car. 539; *Thurston* v. *Mills*, 16 East, 269; *Morland* v. *Pellatt*, 8 B. & C. 727.

[d] *Botten* v. *Tomlinson*, 16 L. J. C. B. 138.

[e] Hob. 206.

[f] Cases *infrà*.

[g] *Mildmay* v. *Smith*, 2 Wms. Saund. 343.

[h] *Morland* v. *Pellatt*, 8 B. & C. 727; *Thurston* v. *Mills*, 16 East, 269; *Giles* v. *Grover*, 2 M. & S. c. 197.

By assignees of bankrupt.

When bankruptcy avoids an execution, the assignees may either affirm or disaffirm the act of any party who, after the act of bankruptcy, has converted the trader's effects into money, either by bringing an action for money had and received to their use, or by bringing an action *ex delicto*.[i] But they must adopt the former if they have affirmed and recognised the wrongful sale and waived the original tort;[k] for, if they have once affirmed his acts and treated him as their agent, they cannot afterwards treat him as a wrongdoer, nor can they affirm his acts in part and avoid them as to the rest. It should be observed, that it is, in general, more advisable for the assignees to proceed for the tort; for if the goods have been sold, they may recover the full value of the goods, deducting the ordinary expenses of sale, though the sale may not actually have produced more than half their worth; but in an action *ex contractu* they can only recover what the party really received.[a] Again, as by bringing an action for money had and received the contract is affirmed, and they have thereby once treated the transaction as a contract of sale, they must pursue it through all its consequences, one of which is, that the party buying may set off another debt owing to him,[b] which cannot be done in tort.[c] Therefore, to avoid a plea of set off or mutual credit, as the case may be, the form *ex delicto* seems, in general, preferable when it can be maintained. When the ground of action, however, is contract, declaring in tort will not render a person liable who would not have been so on his contract.[d] Where the Sheriff sold goods under a *fi. fa.* without notice of a prior act of bankruptcy by the defendant, and paid over the proceeds of the sale to the plaintiff, upon an indemnity, it was held that the defendant's assignees might sue the Sheriff for money had and received.[e]

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[a] 1 & 2 Vict. c. 110, s. 12.

[b] *Valpy* v. *Manley*, 1 C. B. 602, confirming *Fulham* v. *Down*, 6 Esp. 26; *Snowden* v. *Davis*, 1 Taunt. 359.

[c] Ibid.

[d] Ibid.

[e] Ibid.

[f] *Green* v. *Austin*, 3 Camp. 260; *ante*, p. 238.

[g] 16 East, 254, *suprà*.

[h] *Ruston* v. *Hatfield*, 3 B. & A. 204; *Tomlinson* v. *Shynn*, 2 B. & B. 77: see also 1 Ch. Rep. 618, n.

[i] *Rex* v. *Leith*, 2 Term Rep. 148; *Clark* v. *Gilbert*, 2 Bing. N. C. 343.

[k] *Brewer* v. *Sparrow*, 7 B. & C. 310.

Joinder of claims *ex delicto* and *ex contractu.*

By the Common Law Procedure Act 1852, actions *ex contractu* and *ex delicto* may be joined. But the pleader will act not unwisely until the Act be fairly worked out, in keeping as near as may be to the old rules.

Remedy for excess of fees paid.

When a Sheriff claimed, as of right, upon a warrant issued by him in the execution of his office, a larger fee than he was entitled to by law, and the attorney paid it, it was held that the latter might maintain money had and received for the excess so paid, or might set off the sum in an action by the Sheriff against him.[f] So when a Sheriff claims by his return to retain money to which he is not entitled, money had and received will lie.[g]

The action of debt against the Sheriff for an escape was abolished by 5 & 6 Vict. c. 98.

Demand before action, when to be made.

Although a demand before action brought is not absolutely necessary to the maintenance of the action, yet a demand should be made, otherwise the Court will stay proceedings on payment of the sum levied without costs.[h] If, however, upon sale, money remain in his hands, beyond the debt, the defendant, it seems, must demand it of the Sheriff before action brought.[i]

Pleas.

The plea of *never was indebted* operates as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.[k] All matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law on the ground of fraud or otherwise, must be specially pleaded.[a] In an action founded on the Sheriff's return to a fi. fa., as the return is parcel of the record, and *nil debet* was no plea against a record (though facts were mixed with it,[b]) *nunquam indebitatus* seems to be no plea to it.

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[a] *Rex* v. *Leith, suprà.*

[b] *Fair* v. *M'Iver,* 16 East, 130.

[c] See *Wilkins* v. *Carmichael,* Dougl. 101; *Birdwood* v. *Raphael,* 5 Price, 604.

[d] 1 Ch. Pl. 100; and cases cited, ibid. n. (*t*), 6th edit.

[e] *Young* v. *Marshall,* 8 Bing. 43; before 2 & 3 Vict. c. 29.

[f] *Dew* v. *Parsons,* 2 B. & A. 562; *Morgan* v. *Palmer,* 2 B. & C. 729.

[g] *Longdill* v. *Jones,* 1 Stark. 345.

[h] *Jefferies* v. *Sheppard,* 3 B. & A. 696; *Dale* v. *Birch,* 3 Camp. 347.

[i] *Wooddye* v. *Coles,* Noy, 59.

[k] Reg. Gen. (*Plead*). Hil. Term. 1853, r. 6.

**Evidence.**

A debt founded on a Sheriff's return is not grounded on any lending or contract within the meaning of the 21 Jac. 1, c. 16.[c]

The receipt of the money, when the Sheriff has made his return, and when he has not done so, must be proved, as laid down in a former page.

**Damages.**

The amount of damages will be the sum indorsed on the writ (if the whole has been levied), or the sum which he has actually received, deducting all legal charges.

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[a] Ibid. r. 8.

[b] 1 Wms. Saund. 38; 2 ib. 344.

[c] *Jones* v. *Pope*, 1 Wms. Saund. 36.

# CHAPTER VII.

## ACTIONS BY SHERIFF.

### SECTION I.

### EX CONTRACTU.

For Fees. THE Sheriff at common law has no claim for fees which he can enforce by action.[a] But by several Acts of Parliament and rules of Court, already cited, compensation has been given him, with power to levy, over and above the sum recovered by the judgment. It may be, however, that the fees are not levied; and then the question arises, what remedy the Sheriff has for recovery of them; for, to refuse to execute the writ till his fees are paid, is, as we have seen, after payment, an indictable offence. On the stat. of 28 Eliz. c. 4 (containing no express words as to any remedy for fees), it was held, that, by implication, a right was given to the Sheriff to demand the fees mentioned in the statute; and that he might, as in all cases where a statute creates a debt or duty, maintain an action of debt for them.[b] A like construction, by parity of reasoning, would also be put upon the 1 Vict. c. 55, and other statutes which do not, in express words, provide any remedy for fees.

The Sheriff cannot recover his charges for executing a *fi. fa.* by action against the attorney in the cause, unless there be special circumstances from which a jury may infer an actual undertaking by the attorney to pay.[c] A Sheriff's officer, who has been employed by an attorney to execute writs for him, may maintain an action against the attorney for the fees usually paid on such occasions.[d] The client is not liable, there being no privity between him and the officer.[e]

There is nothing in the pleadings or evidence to call for remark.

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[a] Dalt. ch. 119; *Woodgate* v. *Knatchbull*, 2 T. R. 148; *Dew* v. *Parsons*, 2 B. & A. 562.

[b] Moore, 853, pl. 1166; Latch. 19; Palm. 400; *Tyson* v. *Parke*, 2 Lord Raym. 12, 12; *Jayson* v. *Rush*, 1 Salk. 209.

[c] *Maybery* v. *Mansfield*, 9 Q. B. 754.

[d] *Foster* v. *Blakelock*, 5 B. & C. 328; *Walbank* v. *Quarterman*, 3 C. B. 94; *Maile* v. *Mann*, 2 Exch. 608; sed vide *Seal* v. *Hudson*, 4 D. & L. 760.

[e] Ibid.

## SECTION II.

## ON SECURITIES FOR MONEY SEIZED UNDER A FI. FA.[a]

(1 & 2 Vict. c. 110.)

With respect to actions on promissory notes, bills of exchange, &c., seized by the Sheriff under a fi. fa. by virtue of the twelfth section of the above-named statute, it is enacted,

Power to seize promissory notes, bills, &c.

To sue for amount secured by bills of exchange and other securities.

Proviso as to indemnity to Sheriff.

"That by virtue of any writ of fieri facias to be sued out of any superior or inferior Court after the time appointed for the commencement of this Act, or any precept in pursuance thereof, the Sheriff or other officer having the execution thereof, may and shall seize and take any money or bank notes (whether of the governor and company of the Bank of England, or of any other bank or bankers), and *any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money,* belonging to the person against whose effects such writ of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof, and may and shall *hold* any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised; *and may sue in the name of such Sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived;* and that the payment to such Sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, *with or without suit,* or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment or of such recovery and levy in execution as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, and such Sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with Sheriff's poundage and expenses, any surplus shall remain in the hands of such Sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued, *provided that no such Sheriff or other officer shall be bound to sue any party liable* upon any such cheque, bill of exchange, promissory note, bond, specialty or other security, unless the party suing out such execution *shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred* in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action."

### *Bond of Indemnity for suing on Bills, &c.*

KNOW ALL MEN BY THESE PRESENTS that we *G. A.* of —— *G. P.* of —— and *C. W.* of —— in the county of *W.* are held and firmly bound to Sir *G. M.* Bart. of —— High Sheriff of the said county in the sum of £—— to be paid to the said Sir *G. M.* Bart. or to his certain attorney executors administrators or assigns for which payment to be well and truly made we bind ourselves and each of us our and each of our heirs executors and administrators and every of them jointly and severally firmly by these presents sealed with our seals and dated this &c.

WHEREAS the above-named Sir *G. M.* Bart. as Sheriff of the county of —— by virtue of her Majesty's writ of *fieri facias* to him directed against the goods and chattels of one *C. D.* issued at the suit of the said *G. A.* out of her Majesty's Court of Queen's Bench, hath seized and taken in execution a certain promissory note of one *J. B.*; and whereas the said *G. A.* hath applied to the said Sheriff and requested him to sue the maker of the said note for the recovery of the amount thereof, which the said Sir *G. M.* Bart. has consented to do upon being indemnified for so doing.

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[a] He ought to *sell* them; see *ante,* p. 174.

Now THE CONDITION of the above-written obligation is such that if the above-bounden *G. A. G. P.* and *C. W.* or any of them, their or any of their heirs executors or administrators do and shall from time to time and at all times hereafter well and sufficiently indemnify the said *G. M.* Bart. from all costs and expenses to be incurred in the prosecution of such action or to which he may become liable in consequence thereof, then that the above-written obligation to be void otherwise to stand and remain in full force vigour and effect.

Signed sealed and delivered in the presence of me ——.

*G. A.* (L. S.)
*G. P.* (L. S.)
*C. W.* (L. S.)

## *Declaration.*

In the Queen's Bench. The —— day of —— A.D. 18 —

Westmoreland to wit. } *A. B.* Sheriff of the county of *W.* (the plaintiff in this suit according to the form of the statute in such case made and provided) by *J. A.* his attorney sues *C. D.* For that the defendant on &c. by his promissory note now over due promised to pay to one *G. B.* £ —— two months after date but did not pay the same: And the plaintiff further says that heretofore[a] and before the commencement of this suit one *G. P.* in the Court of our lady the Queen before the Queen herself by the consideration and judgment of the same Court recovered against the said *J. B.* a certain debt of £ —— and also —— costs which in and by the same Court were adjudged to the said *G. P.* and with his assent whereof the said *J. B.* was convicted as by the record and proceedings thereof still remaining in the same Court of our lady the Queen before the Queen herself at W. aforesaid will more fully and at large appear: And the plaintiff further saith that the said judgment being in full force and the said sum of £ —— remaining unpaid and unsatisfied the said *G. P.* on &c. for the obtaining of satisfaction thereof sued and prosecuted out of the said Court a writ of *fieri facias* directed to the Sheriff of *W.* by which said writ our lady the Queen commanded the said Sheriff that of the goods and chattels of the said *J. B.* in the said Sheriff's bailiwick he should cause to be levied the sum aforesaid and that he should have that money before our said lady the Queen at *W.* aforesaid immediately after the execution thereof to render to the said *G. P.* for his debt aforesaid; and that the said Sheriff should have there then that writ which said writ afterwards and before the delivery thereof to the plaintiff as such Sheriff as hereinafter mentioned to wit on &c. was duly indorsed with a direction for the said Sheriff to levy £ —— besides Sheriff's poundage officer's fees and all other incidental expenses and which said writ so indorsed afterwards and before the said execution thereof to wit on the day and year last aforesaid was delivered to the plaintiff who then and from thence until and at and after the execution of the said writ was and from thence hitherto hath been and still is Sheriff of the said county of *W.* to be executed in due form of law by virtue of which said writ the plaintiff as such Sheriff as aforesaid afterwards to wit on the day and year last aforesaid and within his bailiwick as such Sheriff seized and took in execution the said promissory note above-mentioned of all which premises the defendant afterwards to wit on the day and year last aforesaid had notice: Yet the defendant hath disregarded his promise and hath not paid the sum of £100 in the said note mentioned or any part thereof to the said *J. B.* before the same was so seized and taken in execution as aforesaid or to the plaintiff as such Sheriff as aforesaid since the same was so seized and taken in execution: To the damage of the plaintiff as Sheriff as aforesaid of £ —— and thereupon according to the form of the statute in such case made and provided he brings suit &c.

Pleas.

It would seem that whatever pleas might have been pleaded to an action brought upon the instrument by the original creditor may be pleaded herein; add, however, that the defendant may deny any other material averment on the face of the declaration, as the issuing of the writ, seizure, &c. It would seem to be the duty of the Sheriff to present, give notice of dishonour, and the like, except where it is to affect the Crown, which cannot be affected by his *laches*.

---

[a] This probably, according to the usual forms of pleading, should have preceded, but as a *general* precedent it will be found more correct.

**How amount of security to be disposed of.**

Upon recovery of the amount of the security the Sheriff must pay over the whole, or so much as will satisfy the debt of the execution creditor; and, if any surplus remain after payment of the debt, together with his poundage and expenses, it must be paid over to the party against whom such writ shall be so issued.

## SECTION III.

### EX DELICTO.

As any one having a special property in goods may bring an action against a wrongdoer, a Sheriff may, with respect to goods seized by him under a *fi. fa.*, maintain an action for any wrong done to them, provided they be at the time in his actual possession.[a] If he abandon possession, the property and possession revert back to the original owner.[b]

When the Sheriff returns *nulla bona*, and there is a recovery against him for his false return, that vests no property in him; it remains as before, and the goods are liable to any subsequent execution for the owner's debt.[c]

---

[a] *Wilbraham* v. *Snow*, 2 Wms. Saund. 47 *a.*; *R.* v. *Eastall*, 2 Russ. C. & M. 158, 197.

[b] *Blades* v. *Arundale*, 1 M. & S. 711.

[c] 2 Vern. 239.

# CHAPTER VIII.

## SHERIFF'S ACCOUNTS.

By the 3 & 4 Will. 4, c. 99, it is provided, that it should not be necessary after the passing of that act for any Sheriff or Sheriffs of any county, city or town in *England or Wales,* to sue out any patent or writ of assistance, or to make or pay proffers, nor should any bailiff or bailiffs of liberties in England or Wales be required to make or pay any proffers or have any day of prefixion, or be apposed, or take any oath before the Cursitor Baron to account, or account or be cast out of Court. It then declares that the accounts of all Sheriffs of counties, cities and towns within *England* (except the counties of Chester, Lancaster, and Durham), shall be examined and audited by the commissioners appointed for auditing public accounts, under 25 Geo. 3, c. 52, 46 Geo. 3, c. 141, and 1 & 2 Geo. 4, c. 121. Sheriffs going out of office (except those of the three counties above-named) within two calendar months next after the expiration of their office, or, in case of death, the Under-sheriff, within the same time, must transmit to these commissioners a just and true account under his hand, of all sums received by him to or for the use of her Majesty and of all sums paid or claimed by him or on his behalf (except such sums as are or have been usually inserted and allowed in the bill of cravings), with all such particulars as shall be needful to explain the same. As regards the Sheriff of Westmoreland, he is required yearly, within two calendar months after the first of January in each year, to transmit to them a like account, with like particulars.

By whom audited.

When to be sent.

Nature of account.

Westmoreland.

In case it shall be necessary for any Sheriff or Under-sheriff to make oath or affidavit to the account so transmitted, or to anything relating thereto, except when the commissioners should require his personal examination before them, such oath or affidavit may be made before any of the judges of the superior courts at Westminster, a commissioner, master extraordinary in chancery,[*] or before any justice of the peace. As regards the bill of cravings, it is now to be preferred to the Lord High Treasurer or the Commissioners of her Majesty's Treasury, who, or any three or more of whom, may grant a warrant for the allowance of

Oath before whom taken.

Bill of cravings.

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[*] Now called, "Commissioners in Chancery," 16 & 17 Vict. c. 78, s. 1.

the same in the Sheriff's account, or for the payment of such sum, in respect thereof, as they shall think reasonable.

Object of the statute.

Its effect as to fees, &c.

Such is a substantial analysis of the statute as relates to Sheriff's accounts.. Before the 3 & 4 Will. 4, c. 99, the Sheriffs in England were put to considerable expense and trouble in obtaining their patents and passing their accounts. To remedy these evils (amongst others) was its main object; and few acts, of late years, are so clear, concise, or effectual in reaching its object. It abolished at once and for ever *all* fees; and, as a consequence, the Sheriff from his appointment to his discharge, is now wholly exempted from every payment in the shape of fees. It repealed the complicated and obsolete forms of accounting through the Pipe Office, Lord Treasurer's Remembrancer's Office, the Foreign Apposers' Office, Land Revenue Audit Office, the King's Remembrancer's Office, &c.—precautionary measures, perhaps, founded in wisdom, when the Sheriff was virtually the Crown Treasurer of the county; but which, after the great increase of taxation and the appointment of receivers, collectors, and other responsible officers, in each revenue department, became worse than useless. So complicated, indeed, as well as expensive was the process of accounting before that statute, that it was beyond the range of an ordinary town agent to do it; and the agency was, generally, if not universally, placed in the hands of one of the officers in the Lord Treasurer's Remembrancer's department—an agency now strictly and very properly forbidden in that department.

### *No.* I. N———.

A JUST and true account of all sums received by Sir *R. S.* Bart. late Sheriff of the county of *N.* from the —— day of —— 18— to the —— day of —— 18— to or for the use of her Majesty and containing the names and residences of all persons incurring fines issues amerciaments or forfeited recognizances sum or sums of money which the said Sheriff or any bailiff or other officer of the said Sheriff has been authorised or required to levy by virtue of any writ or writs issued out of the Court of Exchequer for the Queen (first fruits tenths post fines and fee farm rents excepted) or by the clerk of the peace for the said county or by any town clerk of any town within the said county and to him the said Sheriff directed during his shrievalty for levying fines issues amerciaments or recognizances by virtue of any writ or writs delivered over to him by any former Sheriff with the causes of non-payment or discharges and by whom (whether by warrant of the Lords of the Treasury order of the Court of Exchequer Court of Quarter Sessions or Queen's Sign Manual or otherwise) in case any fine issue or amerciament or forfeited recognizances shall not have been paid or shall have been discharged after payment.

Also an account of all monies received from the late Sheriff being monies received levied or collected by him between the —— day of —— 18— and the —— day of —— 18 — (being the day when the undersigned Sheriff came into office) but to levy which this accountant has not received any writ.

Likewise an account of all the goods and chattels of any felon or fugitive or of any person or persons attainted or outlawed or any waif estray deodand treasure trove casualty or other profit of whatsoever nature which have come to the hands or knowledge of the said Sheriff his Under-sheriff or any other person his bailiff officer or minister or any or either of them.

| Names and Residences of Parties, and Nature of Process. | Gross Amount of each Fine, &c. | | | Amount received of each Fine, &c. | | | Amount of each Fine, Issue, &c. unaccounted for. | | | Observations. | To whom belonging. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | £ | s. | d. | £ | s. | d. | £ | s. | d. | | |
| LONG WRIT. | | | | | | | | | | | |
| J. H. of —— ......... | 10 | 0 | 0 | | | | 10 | 0 | 0 | No goods. | |
| J. H. of —— ......... | 1 | 5 | 0 | 1 | 5 | 0 | | | | | |
| SESSIONS PROCESS. EPIPHANY SESSIONS, 18—. | | | | | | | | | | | |
| M. M. of —— ......... | 10 | 0 | 0 | | | | 10 | 0 | 0 | Discharged. | |
| H. H. of —— ......... | 1 | 0 | 0 | 1 | 5 | 0 | | | | | |
| EASTER SESSIONS. None. | | | | | | | | | | | |
| MIDSUMMER SESSIONS. | | | | | | | | | | | |
| B. B. of —— ......... | 20 | 0 | 0 | 20 | 0 | 0 | | | | | |
| MICHAELMAS SESSIONS. | | | | | | | | | | | |
| R. L. of —— ......... | 2 | 0 | 0 | 2 | 0 | 0 | | | | | |
| R. H. of —— ......... | 5 | 0 | 0 | 5 | 0 | 0 | | | | | |
| FELONS' GOODS. None. | | | | | | | | | | | |
| | | | | 29 | 10 | 0 | | | | | |

### *State of Account of Sir R. S. Bart.*

| CHARGE. | £ | s. | d. | £ | s. | d. |
|---|---|---|---|---|---|---|
| Amount of fines, &c. received, levied under long writ and writs of quarter sessions . . . . | 29 | 5 | 0 | | | |
| Amount received for bill of cravings . . . . | 168 | 3 | 11 | | | |
| Total charge . . . . . . | | | | 197 | 8 | 11 |
| DISCHARGE. | | | | | | |
| Amount of fines, &c. paid to J. W. Esq. . . | 29 | 5 | 0 | | | |
| For bill of cravings as allowed by treasury warrant at the foot thereof . . . . . . . | 168 | 3 | 11 | | | |
| Claimed to be allowed for justices' wages as per account of the clerk of the peace . . . . | 37 | 2 | 0 | | | |
| Claimed to be allowed for granting thirty-four warrants . . . . . . . . . . . . . . | 10 | 4 | 0 | | | |
| Claimed to be allowed for executing seven warrants . . . . . . . . . . . . . . . | 8 | 16 | 6 | | | |
| Total discharge . . . . . . . | | | | 253 | 11 | 5 |
| | | | | 56 | 2 | 6 |

Witness, *W. B.* *R. S.* late Sheriff.

How prepared, and how and to what offices transmitted.

The mode of making up, transmitting, and passing the account is this:—The Sheriffs of all counties, cities, and towns in England receive, about the period of the expiration of their term of office, each *three* copies of the printed form No. 1 on the other side. Within two calendar months next after the expiration of office, or death of the High Sheriff (as the case may be), the blank forms, so received, are filled up, signed by the Sheriff, and transmitted, with the Bill of Cravings (hereinafter explained) to the agent employed to pass the accounts; or, when filled up and signed, are transmitted, or taken, one to the Treasury, one to the Audit Office, and one to the office of the Queen's Remembrancer: the Bill of Cravings is, also, before, or at the same time, transmitted or taken to the Treasury, and thence sent to the Secretary of the Chancellor of the Exchequer, who taxes or reviews it, and gives his *allocatur*.[a] It is then signed by three or more Lords of the Treasury. This done, the person passing the accounts prepares a receipt, to be signed by the Sheriff, of the amount allowed on the bill of cravings, and upon production of that receipt receives a cheque at the Treasury upon the Bank of England. After receipt of the amount allowed on the bill of cravings, the person passing the accounts attends before the Inspector and Receiver General of Fines and Penalties, who examines the account transmitted to and received by him from the Treasury, with the quarterly returns received from the different clerks of the peace and the copies of the process issued from the Court of Exchequer, from the Superior Courts and Courts of Assize; and then forwards it with his certificate to the Commissioners of Audit by whom it is then passed. The Inspector and Receiver General of Fines and Penalties receives from the Sheriff the amount due on the balance of the account, if any.

**How and before whom passed, and difference received or paid.**

The accounts of the Sheriffs of the counties palatine and Cheshire are now passed before the Commissioners of Audit. Those of the principality of Wales are passed in the principality as before the act, and before the Auditor.[b]

**Counties palatine, Cheshire and Wales.**

If the Sheriff did not appear at the day of prefixion, he was deemed an accountant in default, and proceeded against accordingly. The day of prefixion was in nature of a summons for him to appear, and when the four days of grace were passed, he was presumed to have the Crown money in his hands; and proceeded against as an accountant that had been summoned, that is, by an attachment, *fi. fa.*, and *cap. in manus nomine districtionis* against his body, lands, and goods.[c] If under the 3 & 4 Will. 4, c. 99, the two calendar months be substituted for the day of prefixion, including the four days of grace, the same remedies in case of default would seem to apply.

**Consequence of neglect to account within the two calendar months.**

We have already shown when the bill of cravings (No. 2) is made up, when and how transmitted, when and by whom reviewed and allowed. It only remains to be considered, what constitutes this bill—what things are allowed, and what not. The general rule is (and it cannot be defined with greater certainty) that all sums of money, *reasonably* and *bonâ fide* paid for the Crown in and about the execution of the office of Sheriff, constitutes its essentials, and are allowed; such as judge's lodgings, crown calendars, execution of felons, and the like. There is no bill of cravings for *Wales.* The affidavit (No. 3) is at the foot or annexed to the bill of cravings.

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[a] Mr. Adderley, Exch. Seal office, No. 2, Middle Scotland Yard.

[b] 11 Geo. 4 and 1 Will. 4, c. 70, s. 33.

[c] Gilb. Exch. 144. His not accounting now in the *Court* of Exchequer seems immaterial.

The form No. 4 is the Treasury Warrant, an allocatur or order for the same to be allowed.

## No. 2. *Bill of Cravings.*

Surrey. *A. B.* late Sheriff of the said county for the year ending the —— day of —— in the —— year of the reign of her Majesty Queen Victoria and in the year of our Lord 18— craves allowance of the several sums of money hereunder written disbursed and for services done for her Majesty during his shrievalty.

| *Allowed.* | | | | *Craved.* | | |
|---|---|---|---|---|---|---|
| £ 170 | 0 | 0 | Lodgings for the judges at both assizes . . . | £ 180 | 0 | 0 |
| 5 | 0 | 0 | Fitting up the Courts . . . . . . . | 5 | 0 | 0 |
| 5 | 0 | 0 | Balloting box and jury list . . . . . . | 5 | 0 | 0 |
| 4 | 10 | 0 | Parchment for names of magistrates, calendars, &c. . | 4 | 10 | 0 |
| 2 | 0 | 0 | Distributing proclamations as to the meeting of Par- | | | |
| 2 | 0 | 0 | liament . . . . . . . . . . | 2 | 0 | 0 |
| 8 | 0 | 0 | Preparing circular letter to grand jury when altering the time of their attendance at the Spring Assizes | 8 | 0 | 0 |
| 0 | 5 | 2 | Postage of letters . . . . . . . . . | 0 | 5 | 2 |
| 2 | 0 | 0 | Attending persons to read public acts . . . | 2 | 0 | 0 |
| 3 | 3 | 0 | Fees on swearing Sheriff into office, filing oaths, &c. . | 3 | 3 | 0 |
| 55 | 12 | 0 | Under-sheriff's attendance at the Central Criminal Court. Twelve sessions . . . . . . | 75 | 12 | 0 |
| 25 | 4 | 0 | Bailiff. Twelve sessions . . . . . . . | 25 | 4 | 0 |
| 18 | 18 | 2 | For javelin-men and constables at and about the execution of —— [a] . . . . . . . . . | 18 | 18 | 2 |
| £ 303 | 11 | 4 | | £ 333 | 11 | 4 |

## No. 3. *Affidavit.*[b]

*A. B.* of —— gentleman and late Under-sheriff to *M. A.* Esq. late Sheriff of —— maketh oath and saith that the several sums of money above-mentioned and charged to be paid were paid and expended by him this deponent and other the said Sheriff's officers and ministers; and that the services above-mentioned as done and for which the other above-mentioned sums are craved were done as this deponent hath been informed and verily believes.

Sworn &c.

## No. 4. *Treasury Allocatur.*

Let the above Sheriff be allowed for this bill the sum of £ ——
Whitehall Treasury Chambers the —— day of —— A.D. 18—
*Signed by the Lords of the Treasury.*

---

[a] This is a bill which was really sent in and allowed (MSS. in my possession), but these are mere instances of what is craved and allowed; the payments in each case depend on circumstances.

[b] In Wales a *declaration.* As regards *England* the Lords of the Treasury have not as yet substituted the declaration for the oath, 5 & 6 Will. 4, c. 62.

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Woodfall and Kinder, Printers, Angel Court, Skinner Street, London.

## ERRATA ET CORRIGENDA.

Page 2, n. k. *for* c. 30 *read* c. 39.
„ 4, n. b. *add* 6 & 7 Wm. 4, c. 105, s. 5.
„ 5, n. g, *dele* 6 & 7 Wm. 4, c. 105, s. 4.
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Ibid. *for* c. 116 *read* c. 110.
„ 12, n. c, *for* 2 Geo. 1 *read* 2 Geo. 2.
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„ 13, n. b. *after* error *insert* 8 ibid. 778.
„ 40, n. b, col. 1, line 3, *for* K.B. *read* C.B.
Ibid. line 20, *after* Dowl. *insert* 975.
Ibid. col. 2, line 4, *for* 8 Price *read* 3 Price.
„ 81, line 15, *for* Sharpe *v.* Culpepper *read* Sheape *v.* Culpeper.
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„ 250, n. b, *for* Pope *v.* Jones *read* Jones *v.* Pope.
Ibid. n. f, *for* 356 *read* 35 b.
„ 251, n. i, *for* Barton *read* Benton.
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